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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 987

PEARLINE PORTER, PAULINE P. LEONARD and GEORGE C. KEMBLE, Trustee,

Petitioners,

vs.

GLADYS E. PORTER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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and GEORGE C. KEMBLE, Trustee,
Petitioners,

vs.

GLADYS E. PORTER,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Arizona, entered in the above-entitled case on July 14, 1966.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Arizona, dated July 14, 1966, reported at 101 Ariz. 131, 416 P.2d 564, is printed in the accompanying Appendix pp. 1-37.[1]

Other opinions delivered in this case, consideration of which

[1]All future references to the instant opinion will be limited to the Pacific Reporter since the official report has not yet been published.

is necessary herein, are those of the Court of Appeals of Arizona, dated June 21, 1965, reported at 1 Ariz. App. 363, 403 P.2d 298, (Appendix pp. 38-48) and of the Supreme Court of Idaho, dated July 12, 1962, reported at 84 Idaho 400, 373 P.2d 327. (Appendix pp. 49-59)

The following are other opinions of the Supreme Court of Arizona dealing with the earlier stages of the litigation between petitioners, respondent, and respondent's former husband, Arnold Porter:

Kemble v. Stanford, 86 Ariz. 392, 347 P.2d 28 (1959); *Porter v. Stanford,* 86 Ariz. 402, 347 P.2d 35 (1959), *cert. denied,* 371 U. S. 829 (1962); *Kemble v. Porter,* 88 Ariz. 417, 357 P.2d 155 (1960).

JURISDICTION

The decision of the Supreme Court of Arizona was filed on July 14, 1966. Motions for rehearing were denied on October 25, 1966. (Appendix p. 155) The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED

I. Whether, consistent with the full faith and credit clause of the Constitution of the United States, the courts of one state may permit relitigation of questions of law and jurisdiction by way of collateral attack on a sister-state judgment, where the party attacking the judgment appeared and participated in the foreign action and actually litigated, or had an opportunity to litigate, all the issues reopened in the collateral attack.

II. Whether, where all interested parties appear personally and participate in procuring a sister-state judgment, the courts of a second state may, consistent with the full faith and credit clause of the Constitution of the United States, deny recognition to and enforcement of the sister-state judgment on the ground

that the foreign court denied full faith and credit to alleged prior inconsistent judgments of the courts of the second state.

III. Whether, where two successive actions between the same parties in different states result in inconsistent judgments, the courts of the state of the first judgment may, consistent with the full faith and credit clause of the Constitution of the United States, refuse to view the second, in personam judgment as binding on the parties with respect to the issues litigated in the second action.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the following constitutional and statutory provisions:

(1) Constitution of the United States, Article IV, Section 1, which provides:

> Full Faith and Credit shall be given in each State to the public Acts, Records, and Judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

(2) Act of June 25, 1948, Ch. 646, 62 Stat. 947, 28 U.S.C. Section 1738, which provides:

> The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.
>
> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

(3) Certain provisions of the Idaho Code which are printed in the Appendix.

STATEMENT OF THE CASE

The protracted litigation between and among the parties mentioned below has revolved largely around a dispute concerning ownership of certain real property situated in the State of Arizona, the Arizona Hotel. An account follows of the chain of events culminating in the instant decision of the Arizona Supreme Court leaving title to the property in respondent.

In December, 1958, Gladys Porter, respondent herein, left Idaho, where she had lived for several years with her then husband, Arnold Porter, came to Arizona and established residency. In February, 1959, she instituted in Arizona a separate maintenance action against Arnold. The husband was not personally served and made no appearance whatever in the action. Her complaint therein alleged that the Arizona Hotel, located in downtown Phoenix, was community property of the couple.[2] Pearline Porter and Pauline P. Leonard, Arnold Porter's sisters and petitioners herein, intervened in the separate maintenance action claiming that the Arizona Hotel was not the couple's community property but was partnership property in which the sisters owned a substantial interest.[3] On May 14, 1959, a decree of separate maintenance was entered ordering, *inter alia,* periodic support and maintenance payments for Gladys. The judgment imposed a lien

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[2]Abstract of Record pp. 3-4. All future citations to the Abstract of Record in the Arizona Supreme Court are designated "A.R."; those to the Supplemental Abstract of Record are designated "Supp. A.R."

[3]A.R. pp. 13-15.

upon any of the couple's community interest in the Arizona Hotel to secure the payments.[4]

On May 25, 1959, petitioner Georgé C. Kemble, as trustee for the children of Gladys and Arnold, obtained an Arizona judgment against Arnold Porter and an order charging Arnold's partnership interest in the hotel.[5] Petitioner Kemble intervened in the separate maintenance action on December 14, 1959, asserting his rights as trustee under his judgment and charging order.[6]

Also on May 25, 1959, Arnold Porter initiated an Idaho divorce action against his wife, Gladys, praying, *inter alia,* that the court make an equitable division of the couple's community property.[7] On July 10, 1959, Gladys made a personal appearance in the Idaho divorce proceeding and by way of answer and counterclaim therein prayed that she be granted a divorce, that Arnold Porter be ordered to pay her the accrued and all future support and maintenance payments decreed by the Arizona court, and that the Idaho court divide the community property of the parties.[8] In her counterclaim, Gladys specifically alleged that the couple owned a community property interest in the Arizona Hotel.[9]

Shortly after appearing to answer and counterclaim in the Idaho divorce proceeding, Gladys, in Arizona, executed on her Arizona separate maintenance judgment. At a sheriff's sale held on August 20, 1959, she purportedly purchased all of Arnold Porter's interest in the Arizona Hotel,[10] and, according to the majority of the Arizona Supreme Court, thereby became the sole owner of any community interest the couple may have thereto-

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[4]A.R. pp. 31-36, Appendix pp. 60-62.

[5]A.R. pp. 350-51, 296-99.

[6]A.R. pp. 46-55.

[7]Supp. A.R. pp. 1-11, Appendix pp. 63-68.

[8]Supp. A.R. pp. 12-37, Appendix pp. 69-82.

[9]Supp. A.R. pp. 24-25, Appendix p. 75.

[10]A.R. pp. 36A-45.

fore had in the hotel property.[11] There is no evidence of record that Gladys brought the fact of her purchase at the sheriff's sale to the attention of the Idaho divorce court.

Meanwhile, Pearline Porter and Pauline P. Leonard, petitioners herein, intervened in the divorce action to assert and protect their and Arnold's partnership interest in the Arizona Hotel property. The Idaho trial court, with all of the parties before it, entered extensive findings of fact and conclusions of law on December 28, 1960.[12] After noting that all parties had introduced oral and documentary evidence,[13] the trial court made the following findings:

> (1) That the court had jurisdiction of all the parties and the subject matter of the action.[14]
>
> (2) That Gladys Porter was entitled to a divorce.[15]
>
> (3) That the Arizona separate maintenance decree was not entitled to enforcement against the husband in Idaho since he had not been personally served in the Arizona action.[16]
>
> (4) That the Arizona Hotel was partnership property in which the couple owned a community interest.[17]

By judgment and decree dated the same day, the divorce court entered the following orders and judgments:

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[11]Throughout the Arizona litigation, petitioners have consistently maintained that Gladys could not, by executing on her separate maintenance decree and buying in at the sheriff's sale, acquire any of Arnold's interest in the partnership organization. Under Arizona statutory law, an individual's partnership interest may not be sold under attachment or execution for the personal obligation of the partner. See generally, Justice Udall's dissent below, Porter v. Porter, 416 P. 2d 564, 574-75 (1966), Appendix pp. 18-22.

[12]A.R. pp. 300-19, Appendix pp. 83-95.

[13]A.R. p. 301, Appendix pp. 83-84.

[14]A.R. p. 315, Appendix p. 91.

[15]A.R. p. 316, Appendix p. 91.

[16]A.R. pp. 316-17, Appendix pp. 91-92.

[17]A.R. pp. 303-06, Appendix pp. 85-86.

(1) Granted Gladys her divorce.[18]

(2) Ordered the husband, Arnold, to pay substantial alimony to Gladys.[19]

(3) Awarded to Gladys a sizable share of the community property.[20]

(4) Adjudged that the Arizona Hotel was owned by a co-partnership composed of Arnold, Gladys, and the Porter sisters, petitioners herein.[21]

(5) Adjudged that Arnold should be awarded the entire community interest in the Arizona Hotel property.[22]

(6) Ordered that Gladys convey all of her interest in the hotel property to Arnold and the sisters.[23]

(7) Ordered that Gladys dismiss any Arizona action affecting the hotel property.[24]

(8) Enjoined Gladys from initiating any future action affecting the Arizona Hotel.[25]

Pursuant to the Idaho trial court's decree, Gladys, on February 27, 1961, executed quit-claim deeds and an assignment conveying all her interest in the Arizona Hotel property to Arnold and his sisters, petitioners herein.[26] In addition, she formally released her earlier Arizona separate maintenance award.[27]

Gladys appealed to the Supreme Court of Idaho but did not question the trial court's disposition of the Arizona Hotel, its order that she convey to Arnold and petitioners her interest there-

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[18]A.R. p. 325, Appendix p. 97.
[19]A.R. pp. 326-27, Appendix p. 98.
[20]A.R. pp. 327-30, Appendix pp. 98-100.
[21]A.R. pp. 330-31, Appendix p. 100.
[22]A.R. p. 331, Appendix pp. 100-01.
[23]A.R. pp. 333-34, Appendix pp. 101-02.
[24]A.R. pp. 334-35, Appendix p. 102.
[25]A.R. p. 335, Appendix p. 102.
[26]A.R. pp. 344-48, Appendix pp. 104-06.
[27]A.R. p. 349, Appendix p. 106.

in, or its refusal to enforce the Arizona separate maintenance decree. She limited her appeal to that portion of the trial court decree which enjoined her from maintaining any future action affecting the Arizona Hotel. Her arguments on that single point were sustained by the Idaho Supreme Court.[28] Having prevailed on appeal, Gladys did not seek review in this Court by writ of certiorari.

Petitioners Porter and Leonard returned to Arizona, where, together with petitioner Kemble, they filed supplemental complaints in the Arizona separate maintenance action seeking full faith and credit for the portions of the Idaho decree not appealed from by Gladys. Petitioners also prayed that the Arizona trial court quiet their title to the hotel property by decreeing that the hotel was partnership property in which Gladys had no interest and by enjoining her from claiming any interest in the property.[29]

Duly authenticated or certified copies of the Idaho trial court's findings of fact and conclusions of law, its judgment and decree, together with the deeds, assignment, and release executed by Gladys pursuant to the Idaho decree were offered into evidence[30] with the statement by counsel that the full faith and credit clause of the Constitution of the United States required recognition of the Idaho judgment.[31] The trial court refused to admit into evidence the Idaho findings of fact and conclusions of law and the Idaho judgment and decree.[32] However, the deeds, assignment and release executed by Gladys pursuant to the Idaho decree were admitted into evidence.[33] Nevertheless, a directed verdict was

[28]Porter v. Porter, 84 Idaho 400, 373 P.2d 327 (1962), Appendix pp. 49-59.

[29]A.R. pp. 96-104, 124-31, Appendix pp. 107-115.

[30]A.R. pp. 257-58, Appendix pp. 116-17.

[31]A.R. pp. 256-57, 258, Appendix pp. 116-17.

[32]A.R. p. 261, Appendix p. 117.

[33]In its opinion affirming the denial of full faith and credit to the Idaho judgment and decree, the Supreme Court of Arizona held that these instruments were of no effect since the Idaho judgment and decree had been deemed invalid. Porter v. Porter, 416 P.2d 564, 572 (1966), Appendix p. 13.

granted in favor of Gladys Porter.[34] In petitioners' motion for new trial[35] they contended, *inter alia,* that the Idaho court's findings and judgment and decree were entitled to full faith and credit.[36] The trial court denied the motion,[37] and petitioners appealed.

The Arizona Court of Appeals, by unanimous opinion, reversed the trial court, holding that the Idaho decree was entitled to full faith and credit. That court held that the Idaho court could validly order her to convey her interest in the Arizona Hotel property and that the Idaho decree was res judicata as to each and every issue litigated or which could have been litigated in the Idaho proceedings.[38]

The Court of Appeals' opinion was vacated by the Supreme Court of Arizona which held, by a three to two vote (Justices Udall and McFarland dissenting), that the Idaho proceedings were not entitled to full faith and credit. The Arizona Supreme Court also held that the deeds, assignment and release executed by Gladys pursuant to the Idaho decree were of no force and effect.[39]

Petitioners' motions for rehearing in the Arizona Supreme Court[40] were denied on October 25, 1966, by the same three to two vote.[41]

It is in this posture that the case comes to this Court.

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[34]A.R. pp. 267, 272.

[35]A.R. pp. 161-64, Appendix pp. 119-20.

[36]A.R. p. 162, Appendix p. 119.

[37]A.R. p. 274, Appendix p. 118.

[38]Porter v. Porter, 1 Ariz. App. 363, 403 P.2d 298 (1965), Appendix pp. 38-48.

[39]Porter v. Porter, 416 P.2d 564 (1966), Appendix, pp. 1-37.

[40]Appendix pp. 121-54.

[41]Appendix p. 155.

REASONS FOR GRANTING WRIT

I. The Supreme Court of Arizona herein decided important federal constitutional questions involving full faith and credit in a way that directly conflicts with applicable decisions of this Court.

II. The decision constitutes a particularly dangerous precedent if allowed to remain standing, since it deals with a commonplace fact situation that involves important considerations of federalism.

ARGUMENT AMPLIFYING REASONS FOR GRANTING WRIT

I. FULL FAITH AND CREDIT

The full faith and credit clause of the Constitution of the United States together with the legislation enacted pursuant thereto require that the courts of one state give not *some*, but *full* credit to the judicial proceedings of all other states. Such sister-state judgments are entitled to as much credit as they are accorded in the state of rendition. *Johnson v. Muelberger*, 340 U.S. 581, 587 (1951); *Davis v. Davis*, 305 U.S. 32, 39-40 (1938).

The domestic law of Idaho relating to judgments would have prohibited the collateral attack made on the divorce decree by respondent in Arizona. Its courts follow the usual res judicata rule that final decrees of divorce are conclusive and binding on the parties to the action as regards all issues, jurisdictional and otherwise, which were or could have been adjudicated therein.[42] See

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[42] Although, unlike petitioners Porter and Leonard, petitioner Kemble was not a party of record in the Idaho divorce action. Because of his Arizona order charging any of Arnold Porter's partnership interest in the Arizona Hotel property, Kemble succeeded to part of that interest as a result of the divorce court's determination that the hotel property was owned by a partnership in which Arnold had an interest. Under these circumstances, petitioner Kemble would be viewed as being in privy with Arnold, plaintiff in the Idaho action, for purposes of res judicata. See Carver v. Ketchum, 53 Idaho 595, 26 P.2d 139 (1933); Smith v. Kessler, 22 Idaho 589, 127 Pac. 172 (1912); *cf.*, Kite v. Eckley, 48 Idaho 454, 282 Pac. 868 (1929). See generally, Restatement, Judgments, §§ 83, 89 Comments c and g (1942).

Robinson v. Robinson, 70 Idaho 122, 212 P.2d 1031 (1949). Collateral attack by a party to the action is allowed only on grounds of extrinsic fraud.[43] *Treece v. Treece,* 84 Idaho 457, 373 P. 2d 750 (1962).

In its opinion sustaining Gladys' collateral attack and denying credit to the Idaho decree, a majority of the Arizona Supreme Court invoke seven "reasons" to support a result clearly prohibited by settled and well-recognized doctrines of full faith and credit and res judicata. Petitioners will discuss all of these "reasons" immediately below, and will demonstrate that they are totally without merit and that recognition of the Idaho decree was wrongfully refused.

The Arizona Supreme Court, by split decision, held that the Idaho divorce judgment was "fatally defective" and not entitled to full faith and credit for the following seven reasons:

> (1) The Idaho judgment failed to give full faith and credit to prior valid Arizona proceedings.[44]
>
> (2) The Idaho divorce court acted without jurisdiction in distributing the hotel property which was Gladys' separate property and not the couple's community property.[45]
>
> (3) The foreign judgment will not be given greater effect than prior Arizona judgments recognizing that Gladys could obtain as her separate property the couple's community interest in the hotel.[46]
>
> (4) The Idaho trial court had no jurisdiction to entertain petitioners' intervention action.[47]
>
> (5) Jurisdiction over Gladys' separate property, the

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[43]Neither Gladys Porter nor the majority opinion below suggest that the Idaho proceedings were had as a result of fraud.

[44]416 P.2d at 568, Appendix pp. 5-6.

[45]416 P.2d at 568-69, Appendix p. 6.

[46]416 P.2d at 569, Appendix pp. 6-8.

[47]416 P.2d at 569-70, Appendix pp. 8-9.

Arizona Hotel, could not be conferred on the Idaho court by consent.[48]

(6) The Idaho court had no power and authority to "directly affect title" to the Arizona Hotel property.[49]

(7) The Idaho court had no power to adjudicate rights of the partnership in the hotel property, since the partnership organization itself was not a party to the divorce action.[50]

In so holding, the majority of the Arizona Supreme Court overlook established principles of full faith and credit that render untenable each and every "reason" relied upon in denying the Idaho judgment the effect to which it is constitutionally entitled. The discussion below, which will treat each "reason" in turn, clearly indicates that precedents of this Court operate to directly undercut the whole of the majority opinion reasoning and necessarily compel a reversal thereof.

(1) *The Idaho judgment is entitled to recognition and enforcement in Arizona even if it did deny full faith and credit to the Arizona separate maintenance proceedings*:

Petitioners contend that there were no prior Arizona judgments entitled to full faith and credit in the Idaho proceedings,[51]

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[48]416 P.2d at 570, Appendix p. 9.

[49]416 P.2d at 570-71, Appendix pp. 9-11.

[50]416 P.2d at 571, Appendix pp. 11-12.

[51]As for the prior Arizona "adjudication" that Gladys could obtain all of her husband's interest in the hotel property at the sheriff's sale, thereby making it her separate property, Justice Udall, in his dissent in the instant case, convincingly argues that none of these proceedings constitute prior, final judgments on the issue of ownership of the hotel property and were not entitled to full faith and credit in the Idaho court. Porter v. Porter, 416 P.2d 564, 573-77 (1966), Appendix, pp. 15-22.

Gladys did set up the prior Arizona separate maintenance decree in the Idaho divorce action and requested that her husband's obligations for support and maintenance payments thereunder be enforced in Idaho. But, because Arnold was not personally served in the separate maintenance action and did not appear therein, the obligations created in the action

and, if there were, Gladys cannot benefit from her failure to plead them in the Idaho action.[52] If this Court grants the writ of certiorari prayed for herein, petitioners can and will enlarge upon these contentions.

However, it is petitioners' position that this Court need not concern itself with these questions. Because, even if the Idaho courts did err in denying full faith and credit to any prior Arizona judgment or proceeding, it is settled that the Idaho decree is nevertheless entitled to full faith and credit. If Gladys felt that the Idaho trial court erred in this regard, she should have appealed in that action and, if necessary, petitioned this Court for review. The Idaho decree cannot be collaterally attacked on the ground that it wrongfully refused to recognize a prior Arizona judgment.

The leading decision in this regard is *Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939). In that case, the Idaho court, with

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were not personal and did not follow him to Idaho. See Vanderbilt v. Vanderbilt, 354 U.S. 416, 418-419 (1957); Estin v. Estin, 334 U.S. 541 (1948). Arguably, any and all rights that Gladys had under the ex parte Arizona separate maintenance decree were extinguished in the Idaho divorce decree and property division with both parties before the court and participating in the action. See, *e.g.*, Gilbert v. Gilbert, 83 Ohio St. 265, 94 N.E. 421 (1911).

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[52] Even if Gladys' purchase of Arnold's interest at the Arizona sheriff's sale constitutes adjudication that the hotel became her separate property, these matters must be brought to the attention of the foreign court if recognition and enforcement is desired. See Roche v. McDonald, 275 U.S. 449, 455 (1928); Garden Suburbs Golf & Country Club v. Murrell, 180 F.2d 435, 436 (5th Cir.), *cert. denied*, 340 U.S. 822 (1950). There is no evidence of record that Gladys informed the Idaho courts of her purchase at the sheriff's sale.

The majority in the opinion below merely assume, without any support of record, that these matters "must have been brought to the attention of the Idaho court." 416 P.2d at 570, Appendix p. 9. Justice McFarland, dissenting, noted that the record did not support the majority's assumption. 416 P.2d at 583, Appendix p. 35.

This unsupported assumption of fact by the majority of the Arizona Supreme Court is not binding on this Court in determining important issues of federalism. See Davis v. Wechsler, 263 U.S. 22, 24-25 (1923); Postal Telegraph-Cable Co. v. Newport, 247 U.S. 464, 473-74 (1918); cf., FTC v. Sun Oil Co., 371 U.S. 505, 512 (1963).

both parties before it, conferred title to certain personal property upon one Mason, after first finding that a prior Washington judgment between the parties which awarded the property to one Pelkes, petitioner's assignor, was not entitled to full faith and credit because of a jurisdictional defect. In a third action, petitioner attempted to rely upon the original Washington decree. This Court held that she was not entitled to rely upon the Washington judgment

> because of the Idaho decision that the Washington probate court did not have exclusive jurisdiction. This is true even though the question of the Washington jurisdiction had been actually litigated and decided in favor of Pelkes in the Washington proceedings. *If decided erroneously in the Idaho proceedings, the right to review that error was in those (the Idaho) proceedings . . . .*
>
> The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question. *Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court.*
>
> One trial of an issue is enough. The principles of res judicata apply to questions of jurisdiction as well as to other issues', as well to jurisdiction of the subject matter as of the parties. 308 U.S. at 76-78. (Footnotes omitted and emphasis added.)

Furthermore, this Court stated in *Treinies* that it would not pause to determine if Idaho's decision denying full faith and credit to the Washington judgment was a correct one. It stated:

> It is unnecessary to consider whether the Idaho determination as to the jurisdiction of the Washington court was properly made. As the procedure by which a state court examines into the question of the jurisdiction of the court of a sister state is a matter within the control of the respective states . . . it need only be added that

such procedure is subject to question only on direct appeal. *Id.* at 77 n.21. (Citations omitted.)

Other decisions of this Court, both before and after *Treinies*, indicate that the Idaho decree cannot now be collaterally attacked for failure to defer to prior Arizona adjudication. See, *e.g., Sutton v. Leib*, 342 U.S. 402, 408 (1952); *Milliken v. Meyer*, 311 U.S. 457, 462 (1940); *Roche v. McDonald*, 275 U.S. 449, 455 (1928).[53]

(2) *Whether the Idaho court had jurisdiction to order distribution of the hotel property is res judicata in a collateral attack:*

The Arizona Supreme Court held that since Gladys had purchased Arnold's interest in the hotel, making it her separate property, the Idaho court acted without jurisdiction in awarding her interest to Arnold, since under Idaho law[54] the divorce court cannot award the wife's separate property to the husband. *Porter v. Porter*, 416 P.2d 564, 568-69 (1966), Appendix p. 6.

There are several answers to this contention. First, whether incident to a divorce an Idaho court can award one spouse's separate property to another spouse seems to be a question of purely local law, one which the Arizona court cannot decide for Idaho. Second, even assuming that Gladys had informed the Idaho court of the Arizona sheriff's sale,[55] the mere allegation that property is owned separately does not prevent the court from determining the question for itself.

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[53]Numerous other authorities have recognized that the so-called "*Treinies* doctrine" prohibits denial of full faith and credit for this reason. See, *e.g.*, Southard v. Southard, 305 F.2d 730 (2nd Cir. 1962), 65 W. Va. L. Rev. 220 (1963); Lewis v. Lewis, 49 Cal. 2d 389, 317 P.2d 987 (1957); Lynn v. Lynn, 302 N.Y. 193, 97 N.E.2d 748 (1951), *cert. denied*, 342 U.S. 849; Restatement (Second), Conflict of Laws §430d, Illustration (2), §439a, Comments a and e (Tent. Draft No. 10, 1964). Justice Udall, dissenting, correctly noted the applicability of *Treinies* to the case at bar. Porter v. Porter, 416 P.2d 564, 577-78 (1966), Appendix pp. 23-24.

[54]See Heslip v. Heslip, 74 Idaho 368, 262 P.2d 999 (1953).

[55]Petitioners contend she did not. See note 52 *supra*.

However, the short and dispositive answer to this contention is that relitigation in Arizona of this jurisdictional question, if jurisdictional it be, is foreclosed by the doctrine of res judicata. Where the complaining party appeared and participated in procuring the foreign judgment, as Gladys did here, the judgment is res judicata as to all issues, jurisdictional and otherwise, and is entitled to full faith and credit. *Durfee v. Duke,* 375 U.S. 106, 111-114 (1963), and cases cited therein. This constitutional rule obtains even if the particular jurisdictional issue had not actually been litigated, as long as an adequate opportunity to do so was afforded. See *Coe v. Coe,* 334 U.S. 378 (1948); *Sherrer v. Sherrer,* 334 U.S. 343, 351-52 (1948); *Jackson v. Irving Trust Co.,* 311 U.S. 494 (1941).[56] The fact that the Idaho court determined ownership to real property lying in Arizona does not prevent operation of the usual res judicata rule. See *Durfee v. Duke, supra.*[57]

(3) *If the Idaho decree is entitled to full faith and credit, it supersedes any prior inconsistent Arizona judgment between the parties by virtue of the doctrine of res judicata and is entitled to enforcement:*

The "third reason" for Arizona's denial of full faith and credit to the Idaho judgment is the Arizona Supreme Court's statement that a "foreign judgment will not be given greater effect than a domestic judgment on the same issue." *Porter v. Porter,* 416 P.2d 564, 569 (1966), Appendix pp. 6-8.

Such a position completely ignores the simple operation and effect of res judicata doctrine. For if the validity of Idaho decree were to be conceded or established, it then becomes res judicata between the parties as regards all issues actually determined and all issues that could have been determined therein. Restatement,

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[56]See also Restatement (Second), Conflict of Laws §430d (Tent. Draft No. 10, 1964).

[57]See Hancock, *Full Faith and Credit to Foreign Laws and Judgments in Real Property Litigation: The Supreme Court and the Land Taboo,* 18 Stan. L. Rev. 1299, 1319 (1966).

Judgments, Section 42 (1942), describes the effect of the second judgment on a prior inconsistent judgment:

> Where in two successive actions between the same parties inconsistent judgments are rendered, the judgment in the second action is controlling in a third action between the parties.

This rule applies where the actions are brought in different states notwithstanding the contention that the court rendering the second judgment denied full faith and credit to the first judgment or made other errors of fact or law. *Ibid;* Restatement (Second), Conflict of Laws, Section 439a, Comments a and e (Tent. Draft No. 10, 1964).

Many decisions of this Court can be cited in support of petitioners' argument that the subsequent, valid Idaho decree supersedes any prior, inconsistent Arizona determination. However, primary reliance will be placed upon *Sutton v. Leib,* 342 U.S. 402 (1952), which dealt with an analogous situation. In that case, petitioner had married one Walter Henzel, who had just previously obtained an ex parte Nevada divorce from his prior wife, Dorothy Henzel. Later, Dorothy brought a separate maintenance action against Walter in New York, and Walter appeared and defended. The New York court granted Dorothy relief, holding that their prior Nevada divorce was invalid. Petitioner then sued Walter for annulment in New York. Again Walter appeared, litigated, and lost. The New York courts held that the prior Nevada marriage was null and void, since Walter was still legally married to Dorothy at the time of his marriage to petitioner. Addressing itself to the res judicata effect of the New York judgments which invalidated prior Nevada proceedings, this Court commented:

> The New York annulment determines the marriage relationship that is the marital status of petitioner and Henzel, just as any divorce judgment determines such relationship. If the Nevada court had had jurisdiction by

> personal service in the state or appearance in the case of Henzel and the first Mrs. Henzel, its decree of divorce would have been unassailable in other states. *So as to the New York decree annulling the marriage, New York had such jurisdiction of the parties and its decree is entitled to full faith throughout the Nation, in Nevada as well as in Illinois.*
>
> *The New York invalidation of the Nevada divorce of the Henzels stands in the same position.* As Mrs. Henzel was neither personally served in Nevada nor entered her appearance, the Nevada divorce decree was subject to attack and nullification in New York for lack of jurisdiction over the parties in a contested action. 342 U.S. at 408-09. (Footnotes omitted and emphasis added.)

Similarly, in the instant case, the Idaho judgment, rendered with all the parties before it, was entitled to full faith and credit in Arizona. The doctrine of res judicata, as implemented by federal constitutional law, is effective to cause the supercession of the prior Arizona judgments by the subsequent, valid Idaho decree.

> (4) *The question of the jurisdiction of the Idaho court to entertain petitioners' intervention action is solely a question of Idaho law and, in any event, is res judicata herein:*

The court below further concluded that because the Hotel property had become Gladys' separate property, the Idaho trial court was mistaken in its view that the Idaho rules of procedure permitted petitioners' intervention in the divorce action. *Porter v. Porter,* 416 P.2d 564, 569-70 (1966), Appendix pp. 8-9.[58]

The Arizona Supreme Court's reasoning and the result it reaches are both grossly inconsistent with the plain command of the full faith and credit clause. It would deny the Idaho court the right and power to determine for itself the facts before it in de-

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[58]The Idaho rules of procedure governing actions of intervention are printed in the Appendix, p. 156.

ciding whether its own rules of procedure permit intervention in a given case. On both questions, the Arizona court has substituted its judgment for that of the Idaho court.

Even if the Idaho divorce court were mistaken in its belief that its own rules of procedure allowed petitioners' intervention, the mistake was one regarding local Idaho law only and does not offend any command of federal due process. Therefore, the mistake, if any, cannot serve as a basis for denial of full faith and credit.

Whether the decision permitting intervention was one of solely Idaho concern, or whether a wrongful decision would deny to the divorce court jurisdiction over petitioners' intervention action, the questiton is res judicata in the instant action and cannot be made a subject of collateral attack. Since Gladys appeared and litigated in the action, she cannot now reopen the Idaho decree to investigate the correctness of its decisions on matters of law, including jurisdiction. See, e.g., *Milliken v. Meyer,* 311 U.S. 457, 462 (1940); *Treinies v. Sunshine Mining Co.,* 308 U.S. 66, 78 (1939); *American Sur. Co. v. Baldwin,* 287 U.S. 156, 166 (1932).

(5) *Since the Idaho divorce court had jurisdiction over the parties and the subject matter of the divorce, it could validly determine ownership of the Arizona Hotel property and order conveyance of a party's interest therein without having jurisdiction over the hotel property itself:*

Petitioners do not concede the validity of the premises of the Arizona Supreme Court's statement that Gladys could not, by mere consent, confer jurisdiction over the hotel property upon the Idaho court. *Porter v. Porter,* 416 P.2d 564, 570 (1966), Appendix p. 9. First, even if Gladys had merely "consented" to Idaho jurisdiction over the hotel property, the decree would still be entitled to full faith and credit.[59] Second, the divorce court's juris-

[59]Having failed to contest the court's jurisdiction over the property, the decree became res judicata on the question. See, *e.g.,* Coe v. Coe,

(Continued next page)

diction over what the Arizona court describes as Gladys' "separate property" was not conferred by mere consent of the parties, but rested upon extensive findings of fact and conclusions of law entered after substantial proof had been introduced by the interested parties.[60]

It appears to be quite clear, however, that the Idaho court could validly determine title to the property and order a conveyance thereof by a party before the court, even if, for one reason or another, it lacked jurisdiction over the property itself. See, e.g., *Dull v. Blackman,* 169 U.S. 243, 246 (1898), regarding power to determine ownership. See, *e.g., Robertson v. Howard,* 229 U.S. 254, 261 (1913); *Carpenter v. Strange,* 141 U.S. 87, 105 (1891); *cf., Steele v. Bulova Watch Co.,* 344 U.S. 280, 289 (1952), regarding power to order conveyance of property by party to action.

(6) *The Idaho decree did not "directly affect" title to the Arizona Hotel property:*

In announcing a "further reason" for denying the Idaho judgment full faith and credit, the Arizona Supreme Court takes refuge behind the embattled doctrine of *Fall v. Eastin,* 215 U.S. 1 (1909),[61] in holding that the Idaho decree "directly affected" title to Arizona realty. Recognizing, as it must, that the Idaho court's order to Gladys that she convey her interest in the prop-

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334 U.S. 378 (1948); Sherrer v. Sherrer, 334 U.S. 343, 351-52 (1948); Jackson v. Irving Trust Co., 311 U.S. 494 (1941); Restatement (Second), Conflict of Laws §430d (Tent. Draft No. 10, 1964).

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[60]The Idaho trial court's findings of fact and conclusions of law (A.R. pp. 300-19, Appendix pp. 83-95) reveal that the court did not rely merely upon the pleadings in the action in finding jurisdiction. Rather, the determination was made only after the parties had introduced substantial evidence on the question of ownership. No transcript of evidence given in the trial court was prepared.

[61]The doctrine of the *Fall* case, which carves out an exception to the full faith and credit clause, has been subjected to severe criticism. See, *e.g.,* Currie, *Full Faith and Credit to Foreign Land Decrees,* 21 U.Chi.L.Rev. 620 (1954); Hancock, *supra* note 56; Reese, *Full Faith and Credit to Foreign Equity Decrees,* 42 Iowa L.Rev. 183 (1957).

erty to Arnold and the petitioners, and that her compliance therewith did not "directly affect" title to Arizona realty,[62] the Arizona court nevertheless concluded that the Idaho court's determination of ownership of the hotel necessarily "directly affected" title to the Arizona realty. *Porter v. Porter,* 416 P.2d 564, 570-71 (1966), Appendix pp. 9-11.

Such a contention is utterly without merit. If an equity court has the power to order a party to convey her interest in foreign realty and to enforce the order by contempt powers, it follows that the court must also have the power to first determine conflicting claims of ownership in the realty. This principle was expressly recognized in the decision of *Dull v. Blackman,* 169 U.S. 243 (1898). In that case, this Court stated that while litigation respecting title to land ordinarily belongs to the courts of the state wherein the land is situated,

> if all the parties interested in the land were brought personally before a court of another state, its decree would be conclusive upon them, and thus, in effect, determine the title. 169 U.S. at 246.

In the recent decision of *Durfee v. Duke,* 375 U.S. 106 (1963), this Court held that adjudicated issues of fact affecting title to foreign land are subject to the policy of res judicata, and that the decree embodying such adjudication is entitled to full faith and credit. Thus, the Idaho decree and the deeds, assignment and release executed pursuant thereto are not subject to any immunity from the protection afforded by the full faith and credit clause.

> (7) *If the Idaho court erred in not making the partnership organization itself a party to the divorce action, such error is not cognizable in a sister-state collateral attack.*

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[62]The *Fall* decision itself recognizes that foreign equity decrees may validly compel parties to the action to convey their interests in land located outside the jurisdiction of the court. Fall v. Eastin, 215 U.S. at 8, 11. See also Steele v. Bulova Watch Co., 344 U.S. 280, 289 (1952) and Robertson v. Howard, 229 U.S. 254, 261 (1913); Restatement, Conflict of Laws §97 (1934).

Finally, the majority of the Supreme Court of Arizona held that that part of the Idaho decree which determined that the Arizona Hotel property was owned by a partnership was void because the court undertook to adjudicate rights of a party not before it, the partnership organization not being a party to the action by name. *Porter v. Porter,* 416 P.2d 564, 571 (1966), Appendix pp. 11-12.

Whether the Arizona court was right or wrong in its reading of Idaho procedural law is of no consequence.[63] If there was any mistake of law in this regard, it is clear that the judgment cannot be invalidated in a collateral proceeding in another state on account of the error, whether it be an error of law or jurisdiction. See, *e.g., Durfee v. Duke,* 375 U.S. 106, 111-12 (1963), and cases cited therein; *Milliken v. Meyer,* 311 U.S. 457, 462 (1940); *Fauntleroy v. Lum,* 210 U.S. 230, 237 (1908).

II. IMPORTANCE OF DECISION

Review of this decision is also warranted by considerations other than the magnitude of error regarding the doctrine of full faith and credit as applied to the instant case. The fact situation giving rise to this petition for review must occur quite frequently across the nation. Innumerable divorce actions are initiated every year wherein a court of one state is called upon to determine the ownership status of real property located in a sister state and to distribute such property. Undoubtedly, in many such cases, enforcement of the decree is subsequently sought in the state wherein the land is located. Many instances also exist wherein some kind of sister state litigation has preceded the divorce action for which full faith and credit is subsequently sought in the state of initial litigation. In dividing the assets of the couple the divorce court

[63] Reasoning from an Idaho statute (Appendix p. 157) which permits a partnership to be sued in its own name, the Arizona court concluded that the organization *must* have been joined in name in spite of the fact that *all* of the individual partners were named parties to the action. No Idaho statute can be found giving a partnership the right to sue in its own name.

is guided only by general equitable considerations and its own sound discretion. Rarely do both spouses come away completely satisfied with their share of property division.

The decision for which review is being sought herein invokes doctrines that are alien to the letter and spirit of the full faith and credit clause. It wreaks havoc with principles of full faith and credit which prohibit a disappointed participant from relitigating in another state's forum those matters which were or should have been litigated in the state where the divorce was entered. If this decision becomes law, there will be no sanctity in sister-state judgments when they are collaterally attacked in Arizona or in any other jurisdiction following the precedent set by the instant case.

In effect, the Arizona court has permitted a relitigation of the division of the marital assets after a competent court of a sister state has ruled thereon at the request of both husband and wife, both of whom described the Arizona Hotel property as community property in their pleadings and neither of whom appealed the division in Idaho. The award to the husband of all of Gladys' interest in the Arizona Hotel undoubtedly affected the Idaho court's determination of how much she was to receive. Her award in the form of substantial alimony and other community property was surely enhanced as a result of the award to Arnold of her interest in the hotel. By refusing to recognize or enforce the portion of the Idaho decree dealing with the hotel property, the Arizona Supreme Court's decision allows Gladys to receive the benefits of the property division while avoiding its inseparable burden.

The Arizona Supreme Court adopts a provincial view of the doctrine of res judicata in holding that prior Arizona adjudication will not be set aside in favor of a subsequent, inconsistent sister state determination, even if the latter judgment is entitled to full faith and credit. This result completely deprives the full faith and credit clause of any substantive meaning whatever. If a sister state

judgment is entitled to *any* credit, it is entitled to *full* credit. Since the Idaho decree would supersede any prior inconsistent judgment between the parties in Idaho, the courts of Arizona must give the Idaho decree the same effect in Arizona with respect to earlier Arizona litigation. If the result below is allowed to stand, then the rights accorded by the full faith and credit clause become hollow and meaningless.

To support its contention that the Idaho judgment need not be viewed as binding on the parties in Arizona, the majority opinion below relies heavily upon a recent decision of the Supreme Court of Nevada, *Colby v. Colby,* 78 Nev. 150, 369 P.2d 1019 (1962), *cert. denied,* 371 U.S. 888. The *Colby* decision, together with the cases cited for support therein, have been uniformly and roundly criticized as being inconsistent with principles of res judicata embodied in the full faith and credit clause.[64] Reliance upon *Colby* by the Arizona court in the instant case is not only misplaced,[65] it is also indicative of the dangers inherent in allowing a constitutionally disruptive and ill-founded doctrine to survive in an area of law already racked by litigation and emotion. Petitioners respectfully urge this Court to avail itself of this opportunity to review and assess these recent, important developments.

The majority opinion below also incorrectly invokes a dangerously divisive retaliatory doctrine which, without regard for set-

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[64]See, *e.g.,* 63 Colum.L.Rev. 560 (1963); 31 Geo. Wash.L.Rev. 648 (1963); 15 Stan.L.Rev. 331 (1963).

[65]The *Colby* court refused to recognize a Maryland divorce decree as a binding determination of the parties' marital status *in Nevada.* Because the question of litigants' marital status is a matter of "most intimate concern" to the states involved, this Court has suggested that the findings of a sister-state court relating thereto need not be deemed controlling in another domiciliary state. See Williams v. North Carolina, 325 U.S. 226, 230-33 (1945). But see Sutton v. Leib, 342 U.S. 402, 408-09 (1952).

Whatever merit such a suggestion may possess, it would not apply where, as here, the matter at issue is simply one involving ownership of business property. In such a case no special interest of the situs state would be subverted by the operation of the usual res judicata rule which views the subsequent out-of-state judgment as binding on the question.

tled principles of res judicata, denies recognition to a foreign decree because, in the opinion of the Arizona court, another state's courts denied full faith and credit to prior Arizona adjudication.

Invocation of these troublesome legal and constitutional principles by the Arizona Supreme Court brings us to the final consideration. If the Idaho judgment is not deemed conclusive, neither would the instant Arizona judgment settle the litigation. If the Idaho decree is not entitled to full faith and credit in Arizona because it denied recognition and enforcement of alleged prior Arizona adjudication, then the Arizona decision herein would not be entitled to full faith and credit elsewhere, especially in Idaho, because it denied full faith and credit to an Idaho judgment which Idaho views as being conclusive. The Arizona decision merely prolongs the private litigation between petitioners, respondent, and respondent's husband. If, however, this Court were to hold that the Idaho decree is conclusive as between the parties and binding on the Arizona courts, this protracted litigation concerning ownership of the Hotel would be terminated.

CONCLUSION

The holding of the Arizona Supreme Court allowing the relitigation of several legal and jurisdictional issues is in direct conflict with numerous full faith and credit and res judicata principles expounded by this Court over the past half century. Retaliation by the courts of one state for a refusal on the part of another state to enforce the former's judgment, and a refusal on the part of the former to accord the subsequent judgment its normal res judicata effect strike at the core of the interests, public and private, intended to be fostered and protected by the full faith and credit clause.

Petitioners are not alone in contending that the Idaho decree is entitled to recognition and enforcement in Arizona. Of the eight Arizona judges reviewing this matter in the state's appellate courts, five concluded that full faith and credit to the Idaho decree had been wrongfully withheld.

Therefore, petitioners respectfully pray that certiorari be granted to review the judgment and decision in this case.

Respectfully submitted,

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SUPREME COURT, U. S.

FILED

JAN 20 1967

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 987

PEARLINE PORTER, PAULINE P. LEONARD and GEORGE C. KEMBLE, Trustee,

Petitioners,

vs.

GLADYS E. PORTER,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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1. OPINION OF THE ARIZONA SUPREME COURT
101 Ariz. 131, 416 P.2d 564 (July 14, 1966)

In the Supreme Court

OF THE STATE OF ARIZONA

In Banc

PEARLINE PORTER, PAULINE P. LEONARD and GEORGE C. KEMBLE,

Appellants,

v.

GLADYS E. PORTER,

Appellee.

No. 7594 PR

TRIAL COURT AFFIRMED
Opinion of the Court of Appeals, 1 Ariz. App. 363, 403 P.2d 298 VACATED

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Charles L. Hardy, Phoenix,
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BERNSTEIN, Vice Chief Justice

Pursuant to 17 A.R.S. Rule 47(b), Rules of the Supreme Court and A.R.S. §12-120.24, we granted a petition to review the decision of the Court of Appeals, Division 1, reported in 1 Ariz. App. 363, 403 P.2d 298.

The history of this protracted litigation is detailed in the Court of Appeals decision as well as Kemble v. Stanford, 86 Ariz. 392, 347 P.2d 28; Porter v. Stanford, 86 Ariz. 402, 347 P.2d 35, cert. den. 371 U.S. 829, 83 S.Ct. 23, 9 L.Ed. 2d 66 and Kemble v. Porter, 88 Ariz. 417, 357 P.2d 155. We will merely highlight the pertinent facts. On May 14, 1959 Gladys E. Porter, appellee, obtained an Arizona judgment for separate maintenance after constructive service upon her husband Arnold Porter by publication and registered mail which he acknowledged. She had attached the Arizona Hotel in Phoenix when she filed her complaint which described the hotel as community property. The judgment imposed a lien on the hotel in excess of $25,000 for support payments of $3,000 monthly which were later reduced to $1,000 per month. On July 21, 1959 the trial court entered a judgment determining the arrearage due under the separate maintenance judgment and three days later Gladys obtained execution and levied upon the hotel to satisfy an amount over $31,500. The July 21, 1959 judgment was a final judgment. McClanahan v. Hawkins, 90 Ariz. 139, 367 P.2d 196. The sheriff's sale was held August 20th and all of Mr. Porter's interest in the hotel was sold to Gladys who received a sheriff's deed April 7, 1960. As a result of the sale and upon receipt of this deed, Gladys became the sole owner of any interest in the hotel which she and Arnold had theretofore held as community property as well as any interest which Arnold held as his separate property. A.R.S. §25-342. B.

Eleven days after the Arizona separate maintenance judgment was entered, Arnold Porter sued Gladys for divorce in Idaho. She answered seeking full faith and credit for the Arizona judgment and participated in the Idaho divorce proceedings. On December 28, 1960 nearly seventeen months after Gladys bought

Arnold's interest in the Arizona Hotel at the sheriff's sale and nine months after she obtained the deed thereto, the Idaho court refused to give the Arizona judgment full faith and credit. Furthermore, that court found that the Arizona Hotel was owned by a partnership in which Gladys and Arnold had an interest as community property. Arnold Porter was awarded all community property interest in the partnership which owned the hotel and Gladys was given ten days to "execute and deliver unto (Arnold Porter) a transfer and conveyance of all right, title, interest and equity . . . that the defendant (Gladys) has in those properties known as the Arizona Hotel . . ." Pursuant to the court's command, Gladys executed quitclaim deeds and assignments of her interest in the hotel.

This appeal arises out of appellants' intervention in Gladys' separate maintenance action wherein appellants alleged that the Arizona Hotel was owned by a partnership in which they together with Arnold Porter had an interest. After the Idaho judgment was rendered, appellants filed supplemental complaints in intervention seeking full faith and credit for the Idaho court's judgment that the hotel was owned by a partnership and that Gladys had no further interest in the Arizona Hotel by virtue of the quitclaim deed, assignment and release of the Arizona judgment. U.S. Const. Art. IV, §1; 28 U.S.C.A. §1738. Trial was had on December 18, 1961 in the Superior Court of Maricopa County. Documentary evidence was introduced but there was no testimony. The trial court granted a directed verdict for Gladys and this appeal followed.

Certain facts must be emphasized to properly frame the problem before us. In Porter v. Stanford, supra, this court said:

> ". . . It (the trial court) had jurisdiction of the parties (Gladys and Arnold) and of the subject matter of the litigation and jurisdiction to enter an order in such amount as it deemed proper for (Gladys and the children) support pendente lite."

* * *

". . . It also had authority not only to order the husband to pay such amount pendente lite but it also had authority to direct a receiver of the community property to do so."

* * *

". . . The presumption that it is community property (the Arizona Hotel) therefore obtains and will continue to prevail in favor of Gladys E. Porter until it is destroyed by evidence to the contrary." 86 Ariz. 406-407.

Arnold Porter has never attempted to introduce evidence rebutting the presumption. There is a presumption that real property owned by husband and wife is community property and nearly conclusive evidence is required to overcome the presumption which alone will support a judgment. Kennedy v. Kennedy, 93 Ariz. 252, 379 P.2d 966.

Payments for separate maintenance become vested when they become due and cannot be modified thereafter. McClanahan v. Hawkins, supra. A judgment based upon such payments is entitled to full faith and credit. Sistare v. Sistare, 218 U.S. 1, 30 S.Ct. 682, 54 L.Ed. 905.

No authority need be cited to support the validity of a separate maintenance judgment where a resident spouse attaches property in Arizona and serves the nonresident spouse by registered mail as provided in Rule 4(e), 16 A.R.S. Porter v. Duke, 34 Ariz. 217, 270 P. 625. The court has jurisdiction to determine the rights of the nonresident spouse in the attached property. 24 Am. Jur.2d Divorce and Separation, §§546, 935, 995. We have recognized the validity of a separate maintenance suit which based jurisdiction over a nonresident spouse upon the fact that community real property was attached in the state. White v. White, 83 Ariz. 305, 320 P.2d 702. Moreover, we have recognized that a lien in favor of the wife may attach to the husband's share of community owned partnership property. Spector v. Spector, 94 Ariz. 175, 382 P.2d 659. In this regard, we note that partnership

assets acquired during coverture are community property and belong to both spouses. Coe v. Winchester, 43 Ariz. 500, 33 P.2d 286. The sheriff may sell the attached property, whether separate or community, to satisfy a judgment for past due support payments and the nonresident spouse is bound by the sheriff's sale to the extent of his interest in the property. Pennington v. Fourth National Bank, 243 U.S. 269, 37 S.Ct. 282, 61 L.Ed. 713.

The above principles will be referred to as we analyze the problem before us. Stated most simply, the issue is whether the trial court erred in directing a verdict for Gladys based on the conclusion that appellants failed to prove the Arizona Hotel was owned by a partnership. Apart from the documentary evidence which we shall consider subsequently, appellants relied primarily upon the Idaho judgment. Hence, we must decide whether the Idaho judgment is entitled to full faith and credit. We think not.

We note that appellants do not ask us to merely give full faith and credit to the Idaho judgment. Instead, we are asked to give it greater credit than the prior Arizona judgments. We do not think the full faith and credit clause requires such a conclusion.

In the first place, the Idaho court was obliged to give full faith and credit to the Arizona separate maintenance judgment and to the later judgment based upon the arrearage for support payments. Pursuant to these judgments, Gladys obtained all of Arnold's interest in the hotel which thereafter was her separate property. We pointed out above that as between Gladys and Arnold, there was adjudication that she owned his interest in the hotel and there was no community property interest in the hotel. That adjudication was entitled to full faith and credit in the Idaho trial court. American Exp. Co. v. Mullins, 212 U.S. 311, 29 S.Ct. 381, 53 L.Ed. 525. The Idaho Supreme Court recognized that its trial court may have erred in refusing to grant full faith and credit to the Arizona judgments. Gladys appealed that part of the divorce decree which prohibited her from maintaining, instituting or prosecuting any action affecting the Arizona Hotel and the

Idaho Supreme Court said the judgment was too broad because:

> ". . . This enjoinder will prevent appellant from exercising any rights which she may have *outside the present action* and to all rights which may enure to her in the future by virtue of this decree or *otherwise.*" Porter v. Porter, 84 Ida. 400, 373 P.2d 327, 332. (Emphasis supplied)

The Idaho judgment is fatally defective because it failed to give the prior valid Arizona judgments full faith and credit and, therefore, is not entitled to full faith and credit by this court. Reynolds v. Stockton, 140 U.S. 254, 11 S.Ct. 773, 35 L.Ed. 464; Dixon v. Dixon, 76 N.J.Eq. 364, 74 Atl. 995; Hanna v. Stedman, 230 N.Y. 326, 130 N.E. 566.

Secondly, the Idaho judgment is not entitled to full faith and credit because the Idaho court had no jurisdiction, power or authority in the divorce proceeding to enter an order distributing property which was Gladys' separate property and not community property. At the sheriff's sale, Gladys acquired all of Arnold's interest in the Arizona Hotel and it follows that the hotel was not community property thereafter. Idaho is a community property state and the court "divides" the community property only when it grants a divorce. Idaho Code §32-712. The Supreme Court of Idaho has said that:

> ". . .. The court has the power under said section (32-712) to divide the *community property* between the parties, but has *no power or authority to award the wife's separate property, or any part of it, to the husband.*" Heslip v. Heslip, 74 Idaho 368, 262 P.2d 999, 1002. (Emphasis supplied)

It is axiomatic that full faith and credit need not be given to the judgment of the Idaho court because it acted without jurisdiction. Estin v. Estin, 334 U.S. 541, 68 S.Ct. 1213, 92 L.Ed. 1561.

There is a third reason why the Idaho judgment is not entitled to full faith and credit. A foreign judgment will not be given

greater effect than a domestic judgment on the same issue. This court has held that the Arizona Hotel was community property as between Gladys and Arnold by virtue of a strong presumption which was never overcome and has recognized that Gladys Porter could obtain Arnold's interest in the hotel as her separate property by purchasing it at the sheriff's sale to satisfy her judgment for support payments due her. The full faith and credit clause does not compel us to overrule our decision by recognizing the Idaho judgment were we to concede its validity. The United States Supreme Court has said that "The rule of primacy to the first final judgment is a necessary incident to the requirement of full faith and credit." Hanson v. Denckla, 357 U.S. 235, 256, 78 S.Ct. 1228, 2 L.Ed. 2d 1283. The case of Hammell v. Britton, 19 Cal.2d 72, 119 P.2d 333 quotes with approval from Martin Bros. Box Co. v. Fritz, 228 Iowa 482, 292 N.W. 143 as follows:

> " 'The full faith and credit clause requires the courts of one state to give to the judgment of a court of another the same effect that is accorded such judgment in the latter state. (citations omitted) Under such clause, since the Iowa judgment has been adjudicated to be valid in Iowa, the Indiana court should have enforced such judgment. It refused to do so. We know of no decision which would support the proposition that, if a judgment has been adjudicated to be valid and enforcible by a court in Iowa, but enforcement of such judgment is thereafter refused by a court in Indiana, the Iowa court must then follow the example of the Indiana court and also refuse to enforce such judgment. We are unwilling to so construe the full faith and credit clause.' " 119 P. 2d 339

The Supreme Court of Nevada has said:

> "Analysis demands the conclusion that (plaintiff) does not here ask us to merely accord full faith and credit to the Maryland decree. Instead, we are asked to give it greater credit and respect than the prior decree of our own State lawfully entered. Full faith and credit does not re-

quire, nor does it contemplate, such actions from us." Colby v. Colby, 78 Nev. 150, 369 P.2d 1019, 1023, Cert. denied 371 U.S. 888, 83 S.Ct. 186, 9 L.Ed. 2d 122. Accord: Perry v. Perry, 51 Wash.2d 358, 318 P.2d 968; Astor v. Astor, 107 So. 2d 201 cert. den. 120 So.2d 176; Atkinson v. Kettler, 372 S.W.2d 704 affd. 383 S.W.2d 557.

It is argued by appellants that the Arizona judgments are entitled to full faith and credit as between Gladys and Arnold only. We determined their rights in the hotel but not the rights of appellants. It would follow that the Idaho court was not faced with a final judgment in the action between Gladys and appellants concerning ownership of the hotel and the Idaho judgment is not void for that reason. Hence, the Idaho judgment was the first decision on the ownership issue as between Gladys and appellants and must be given full faith and credit by this court. We do not agree.

If the Idaho trial court had given full faith and credit to the prior Arizona judgments or recognized that the hotel was not community property it could not have entertained appellants' intervention action. Ordinarily, rights to real property can be litigated in a divorce proceeding as an incident to the dissolution of the marriage and third persons claiming an interest in the property may intervene. Potter v. Potter, 35 Wash. 2d 788, 215 P.2d 704; Brust v. Brust, 181 Or. 307, 181 P.2d 632; Wharff v. Wharff, 244 Iowa 496, 56 N.W.2d 1; Anno: 102 A.L.R. 814. However, the hotel property was not involved in the Idaho divorce proceeding because any interest which the parties previously held as community property, had become the separate property of Gladys. Rules 14 and 24 of the Idaho Rules of Civil Procedure deal with third party practice and intervention actions. Rule 14 allows either party to bring in others which was not the case here. Rule 24(a) allows intervention by right where, among other things, "the applicant is so situated as to be adversely af-

fected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof." This rule is also inapplicable. The appellants who intervened in the Idaho divorce suit would not have been affected by a distribution of property because the court could only distribute community property. The hotel, in which appellants claimed an interest, was Gladys' separate property. Rule 24(b) allows permissive intervention where there is a common question of law or fact involved in the main suit and the intervenor's suit. The ownership of the Arizona Hotel was not at issue in the Idaho suit between Arnold and Gladys and that was the only issue appellants interjected into the intervention suit. It follows that there was no common question of law or fact. The Idaho trial court had no power or authority to entertain the intervention action and we need not give full faith and credit to its judgment. Estin v. Estin, supra.

Appellants further contend that Gladys consented to the jurisdiction of the Idaho court. It is irrelevant that Gladys and appellants may have litigated the ownership of the hotel in the Idaho court because "it is a universal rule of law that parties cannot, by consent, give a court jurisdiction of a subject matter of which it would not otherwise have jurisdiction, and a judgment rendered in such a case is not validated by the consent." Application of Duke H. Martin, 76 Idaho 179, 279 P.2d 873; 30A Am.Jur., Judgments, §27. It is true that Gladys filed an answer to the Idaho divorce complaint on July 10, 1959, alleging that the Arizona Hotel was community property which it was at that time although burdened with her lien for support payments. However, two weeks later the execution and sale took place and the hotel was no longer community property and became her separate property by reason of the sheriff's sale which fact must have been brought to the attention of the Idaho court.

There is a further reason why the Idaho judgment is not entitled to full faith and credit. Idaho had no power or authority and was completely without jurisdiction to establish or quiet or

otherwise directly affect title to the Arizona Hotel property. Durfee v. Duke, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186; Fall v. Eastin, 215 U.S. 1, 30 S.Ct. 3, 54 L.Ed. 65. Idaho has recognized this principle. Taylor v. Hulett, 15 Idaho 265, 97 P. 37. It is clear that the Idaho trial court attempted to directly decide ownership and title of the Arizona Hotel. In its findings of fact it said:

"IX

"This court finds that the Arizona Hotel, . . . is owned by the Continental Hotels System, a co-partnership, . . ."

In its judgment and decree it said:

"It is further ORDERED, ADJUDGED AND DECREED that the Continental Hotels System, a co-partnership, . . . is the owner of the following-described real and personal properties, to wit: (The Arizona Hotel)"

Pursuant to the finding and judgment, Gladys was ordered to execute within ten days the aforementioned quitclaim deeds and assignments of her interest in the hotel and if she failed to do so, "the clerk of this (Idaho) court is hereby empowered to execute and deliver such conveyance as are (sic) necessary to carry into force and effect said judgment."

Appellants argue that the Idaho court simply determined the rights and equities in the hotel property of the parties before it. They cite Kennedy v. Morrow, 77 Ariz. 152, 268 P.2d 326 and Butterfield v. The Nogales Copper Co., 9 Ariz. 212, 80 P. 345 for the principle that an equity court's decrees based upon in personam jurisdiction are valid though they concern or affect land out of the state. We have no quarrel with those decisions, but they are inapplicable to this case for several reasons. It is true that the Idaho court had jurisdiction over the parties and the subject matter of the divorce but it had no jurisdiction to order Gladys to convey her separate property. Heslip v. Heslip, supra. We have said:

"'* * * The court must have (a) jurisdiction of the subject matter of the case, (b) jurisdiction of the persons

involved in the litigation, and (c) jurisdiction to render the particular judgment given. * * *' "

* * *

"While this court has held that a divorce action is an action in equity, (citation omitted), yet the trial court may not assume a jurisdiction not given it by statute because divorce is primarily a statutory action and equity is invoked in aid of the execution of the statute. Section 27-808, A.C.A. 1939, supra, does not include the wife's right to demand an inventory of the husband's separate property. Such authority not expressly given by statute cannot thus be assumed." Van Ness v. Superior Court, 69 Ariz. 362, 364, 365, 213 P.2d 899.

Divorce actions where the court undertakes to divide community property both in and out of the forum must be carefully distinguished. We reemphasize the fact that at the sheiff's sale Gladys acquired as her separate property whatever interest Arnold had in the hotel to satisfy her judgment. Likewise, it is important to distinguish cases where, for example, one party sues another for breach of a contract to convey land situated in another state. Here, the appellants' action in Idaho was in the nature of a suit to quiet title to the Arizona Hotel and the court undertook to directly adjudicate title thereto. That conclusion becomes apparent when we ask the following question: would the Idaho court have ordered Gladys to execute the quitclaim deed if it had not *first* decided that the hotel was owned by a partnership or that it was community property? Obviously not. It determined in the divorce decree who had title to the property and *thereafter* ordered the parties to execute all conveyances necessary to carry out its judgment and decree.

Additional evidence that the Idaho court did not merely determine the rights of the parties before it is the fact that the partnership in which ownership of the hotel was found to be lodged was not a party before the court. Furthermore, the Uniform Partnership Act is in effect in Idaho so that a partnership can sue or be

sued in its own name. Idaho Code, §53-301 et seq, §5-323. The Continental Hotels Systems partnership was not a party to the Idaho suit. Therefore the court was not merely adjudicating the rights of parties before it when it decided that the partnership owned the Arizona Hotel. That part of the Idaho judgment is void. Durfee v. Duke, supra; Fall v. Eastin, supra; Taylor v. Hulett, supra.

We must next consider the documentary evidence submitted by appellants at the trial below to determine whether they made out a prima facie case that the Arizona Hotel was owned by a partnership which would require that Gladys' motion for a directed verdict be denied. Figueroa v. Majors, 85 Ariz. 345, 338 P.2d 803. The evidence shows that on July 30, 1943 Gladys and Arnold, as husband and wife, acquired a warranty deed to the Arizona Hotel which was recorded August 13, 1943 creating a presumption of community property. There was an agreement dated September 21, 1943 which stated that Gladys and Arnold owned one-half interest in the hotel and R. E. Spaulding and his wife owned the other one-half interest. The Spauldings conveyed their alleged interest to Arnold and Gladys by warranty deed dated June 30, 1948 and they were again presumed to own all of the Arizona Hotel as community property. There is a mortgage dated August 14, 1958 which recites that Gladys and Arnold own the hotel as husband and wife. There is a lease dated April 1, 1949 between Arnold Porter as lessor and a tenant of the hotel as lessee. There is a partnership agreement dated January 1, 1943 — seven months before Gladys and Arnold acquired title to the hotel — between Gladys and Arnold, Andrew Rickett and his wife, and appellants Pearline Porter and Pauline Leonard. The agreement makes no reference to the Arizona Hotel. There is a lease dated February 21, 1956 betwen Arnold, Gladys, Pearline Porter and Pauline Leonard as co-partners and lessors and a corporation as lessee to a portion of the Arizona Hotel. This was the only document admitted in evidence which suggests that the Arizona Hotel is owned by a partnership. The trial court con-

cluded that this document, being unexplained, fell short of the "nearly conclusive" evidence required to overcome the presumption created by the warranty deeds of July 30, 1943 and June 30, 1948 that the hotel was the community property of Gladys and Arnold. Kennedy v. Kennedy, supra. Considering the entire record in the case, we will not disturb this finding. The other documents in evidence depended for their validity upon the trial court giving full faith and credit to the Idaho judgment. Since we have decided otherwise, the quit-claim deed, assignment and release of judgment were of no effect. Garren v. Rollis, 85 Idaho 86, 375 P.2d 994; 49 C.J.S., Judgments §449.

Appellant Kemble concedes that "The crux of this case is the validity of the Idaho decree of divorce." In view of this decision denying full faith and credit to the Idaho judgment and our affirmance of the trial court's directed verdict, the other assignments of error raised by appellants are moot. We have, however, considered them and find them to be without merit.

The opinion of the court of appeals is vacated and the judgment of the trial court is affirmed.

CHARLES C. BERNSTEIN, Vice Chief Justice

CONCURRING:

FRED C. STRUCKMEYER, JR., Chief Justice

LORNA E. LOCKWOOD, Justice

UDALL, Justice — Dissenting:

We are confronted in this appeal with the constitutional question of whether the courts of the State of Arizona have refused to give full faith and credit to a sister state's judgment in compliance with Art. IV, § 1 of the Constitution of the United States and Art. 2, § 3 of the Constitution of Arizona. My analysis of the facts and interpretation of the law requires a conclusion that the question must be answered in the affirmative.

I cannot agree with the result reached by the majority of this Court for the following specific reasons: (1) There was never a

final judgment in this state, prior to the Idaho judgment, that determined ownership of the Arizona Hotel property on the merits of the controversy; therefore, the Idaho trial court did not have to give full faith and credit to a prior Arizona judgment; (2) Even assuming a valid Arizona judgment, the Idaho judgment was subsequent in time and therefore entitled to full faith and credit; (3) The appellee, Gladys Porter, waived her rights in the Arizona property by appearing in the Idaho action, and by subsequent acts of executing quit claim deeds, assignments and releases of her interest in the Arizona Hotel property; (4) The first final determination on the merits of any interest of the Porter sisters in the Arizona Hotel property was by the Idaho court and the sisters were proper parties, according to the Idaho court's construction of its own judicial rules, to intervene in the action in Idaho.

The Constitution of the United States requires each state to give full faith and credit to the judicial proceedings of every other state. Article IV, § 1 of the Constitution of the United States provides as follows:

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

In 28 U.S.C.A. § 1738, Congress has prescribed the manner in which these records may be proved and this statute reads in part as follows:

> "The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

> "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

Thus, a judgment of a court of general jurisdiction of a sister state duly authenticated is prima facie evidence of the jurisdiction of the court to render it and of the rights which it purports to adjudicate. Barber v. Barber, 323 U.S. 77, 65 S.Ct. 137, 89 L.Ed. 82; De Sonora v. Morales, 23 Ariz. 248, 203 Pac. 328.

The record in this case is clear that no court in Arizona, prior to this appeal, has decided, on the merits, that the Arizona Hotel is community property. In Porter v. Stanford, 86 Ariz. 402, 347 P.2d 35, cert. denied, 371 U.S. 829, 83 S.Ct. 23, 9 L.Ed.2d 66, this Court did not hold that title to the Arizona Hotel property had been determined by the Superior Court. In quashing the alternative writ of prohibition, we simply ruled that the Superior Court had acted within its jurisdiction in ordering the receiver of the property to make support payments to Gladys Porter, because a presumption that the property was community property obtained and would continue to prevail until destroyed by evidence to the contrary. This, of course, is fundamental community property law in this jurisdiction. The presumption is not conclusive, and if a party proves by clear, strong, satisfactory cogent and convincing evidence, at a trial on the issues, that property was held under a different form of ownership, the presumption is rebutted. Kingsbery v. Kingsbery, 93 Ariz. 217, 379 P.2d 893.

The facts and circumstances in each case determine whether the presumption has been rebutted. In all cases, however, there must be a judicial determination of whether property is community. A mere allegation by one party that property is held under a form of ownership, an execution, and a sheriff's sale are certainly not sufficient to confirm a presumption.

As was stated in Porter v. Stanford, supra, by Justice Johnson in his dissent:

> "It is further stated in the majority decision that '* * * The presumption that it (Arizona Hotel) is community property therefore obtains and will continue to prevail in favor of Gladys E. Porter until it is destroyed by evidence to the contrary.' I am definitely of the opinion that whatever presumption prevailed in favor of Gladys E. Porter that the hotel property was community property completely disappeared 'in the sunshine of actual facts,' Seiler v. Whiting, 52 Ariz. 542, 84 P.2d 452, 455; for at the hearing of June 19, 1959, the respondent court admitted in evidence a lease executed by Gladys E. Porter, leasing space in the Arizona Hotel, the preamble of which recited that the lessors, William A. Porter, Gladys E. Porter, and the petitioners herein were partners; and as we said in the Seiler case '* * * The presumption, when the opposite party has produced prima facie evidence, has spent its force and served its purpose, and the party then, in whose favor the presumption operated, must meet his opponent's prima facie evidence with evidence, and not presumptions. * * *'.
>
> [Further, evidence that this presumption completely disappeared is indicated by Gladys Porter's counterclaim in Idaho, which stated: "the parties hereto own as community property an interest in the Arizona Hotel . . .", infra; the findings of the Idaho Court that the property was partnership as indicated by the finding of fact: "The court finds that the interest of [the Porter sisters] in and to the Continental Hotels System, a co-partnership, * * *, is a bona fide partnership interest therein, * * *. The Court further finds that at all times partnership tax returns have been filed with both the Federal and State governments and that the interests of the intervenors has at

all times been so declared by the records, books and files of said co-partnership.", infra; and, that the presumption was not conclusive by language approved by this Court in Kemble v. Porter, 88 Ariz. 417, 357 P.2d 155.]

"The net result of the majority opinion in upholding the action of the trial court in ordering the receiver to pay to Gladys E. Porter the sum of $1,000 per month for support of herself and minor children from the Arizona Hotel prior to an adjudication and a decree that such property was community property of William A. Porter and Gladys E. Porter, permits an individual creditor of a member of a partnership to have partnership property applied in liquidation of her claim before an accounting is had of the partnership and before the creditors of the partnership are satisfied." 86 Ariz. at 411, 347 P.2d at 40-41.

* * *."

Prior to the separate maintenance decree in favor of Gladys Porter, the Porter sisters intervened in the suit and contended the hotel property was owned by a partnership. A perfunctory reading of the separate maintenance decree conclusively shows that Gladys Porter had a lien only on the parties' "community property" in this state. The pertinent portion of the Arizona separate maintenance decree is as follows:

" * * * The Court further finds that all of the community property of the plaintiff and defendant located in the State of Arizona should be charged with the support of the plaintiff, and for that purpose any *community interest* in the Arizona Hotel, being * * * is to be used for the payment of plaintiff's and the minor children's support and maintenance, and should be set aside for that purpose.

* * *

"4. That the plaintiff have a lien on all of the *community property* of the parties hereto for support under a *pendente lite* order, which has not yet been paid to her * * *.

"5. That any *community interest* of the parties hereto in the Arizona Hotel being * * * is hereby charged with payment of the support to the plaintiff and that the lien hereinabove set forth is to affix to any community interest in the Arizona Hotel." [Emphasis added]

There is no doubt under the laws of this state that if the Arizona Hotel property was subsequently determined to be partnership property the above decree would be ineffective as to such. It scarcely seems necessary to cite authority for the proposition that partnership property, or the interests of an individual partner in partnership property, may not be sold under attachment or execution for the individual debt or other personal obligation of one of the partners. An unlimited sale of partnership property under an execution against only one of the partners is not in compliance with the statutory law of this state.

A.R.S. § 29-225 B(3) specifically prohibits the levying of an attachment or execution upon the partner's interest in partnership property for a personal obligation. The only remedy is that provided by A.R.S. § 29-228, where a charging order may be permitted on a judgment charging the interest of the debtor partner. Prior to the enactment of the Uniform Partnership Act, this Court in Olds Bros. Lumber Co. v. Marley, 72 Ariz. 392, 236 P.2d 464, recognized the above rule. See also, Sherwood v. Jackson, 121 Cal. App. 354, 8 P.2d 943; State v. Elsbury, 63 Nev. 463, 175 P.2d 430.

Since A.R.S. § 29-225 prohibits the attachment or execution of a partner's right in specific partnership property, except on a claim against the partnership, the levy of the general execution upon the Arizona Hotel property, the sale, issuance of a certificate, and the issuance of a deed were void until the issue of whether the property was community property or partnership property was determined.

It is well established that only the right, title and interest of a judgment-debtor is sold at an execution sale, Fay v. Harris, 64

Ariz. 10, 164 P.2d 860, and if the sheriff attempts to sell property other than that of the judgment debtor, the sale is void and the purchaser acquires no title to the property sold. Steinfeld v. Copper State Mining Co., 37 Ariz. 151, 290 Pac. 155; Costello v. Friedman, 8 Ariz. 215, 71 Pac. 935.

As was stated by this Court in Burney v. Lee, 57 Ariz. 41, 46, 110 P.2d 554:

> "Was the ownership or right to possession of the premises in either cause No. 44643 or No. 46685? It is clear that in the first, an action by Lee against the Millers for money due, it was not involved and could not have been. It is true the court rendered judgment for Lee and at the same time ordered the judgment lien on the premises foreclosed and the property sold to satisfy the judgment but this did not determine that the premises whose title then stood in the name of Alice Luther and had for more than a year were the property of the Millers and not hers. When he filed the suit Lee caused the writ of attachment to be issued and levied on a number of parcels of real estate as the property of the Millers, among which was that in question here, but in ordering the lien foreclosed and the property sold to satisfy the judgment the court did not determine that the property was his. So, naturally, the order foreclosing the lien and directing the sale applied only to the interest of the Millers, whatever that was, and could not have deprived Alice Luther who was not even a party to the action of her interest, if she had any. This left open the question as to who was the owner, in fact it had not been raised, so when Lee became the purchaser of the premises at the sheriff's sale he acquired no more than the Millers then had, a matter that was thereafter to be determined, provided it should be questioned by the record title holder or her grantee."

Gladys Porter's position and the majority opinion are correct only if the Arizona Hotel property had been adjudicated com-

munity property of Arnold and Gladys Porter, and not partnership property belonging to the Continental Hotels System. At the time of the sheriff's sale, this issue had not been determined. This was the very reason given by this Court for dismissing the appeal, from the denial of a motion to set aside the execution sale, in Kemble v. Porter, 88 Ariz. 417, 357 P.2d 155. If it had been judicially determined that the Arizona Hotel property was community property, then the majority opinion might be correct in stating the property belonged to Gladys Porter as her separate property and Idaho should have given full faith and credit to an Arizona judgment. This was not the case before the Idaho court. The majority opinion would require that full faith and credit be given an Arizona sheriff's sale which is not the law. Only final judgments on the merits by a competent court, absent fraud and with jurisdiction, are within the ambit of the full faith and credit clause of the United States Constitution.

Before this matter came to trial in Arizona, a court of competent jurisdiction, the Idaho District Court, determined that the Arizona Hotel property was the property of the Continental Hotels System partnership and not of the community consisting of Arnold and Gladys Porter. This determination is res judicata and entitled to full faith and credit in Arizona. Day v. Wiswall's Estate, 93 Ariz. 400; 381 P.2d 217. The result is that Gladys Porter purchased nothing at the sheriff's sale.

I do not agree that this Court "has held that the Arizona Hotel was community property as between Gladys and Arnold by virtue of a strong presumption which was never overcome and has recognized that Gladys Porter could obtain Arnold's interest in the hotel as her separate property by purchasing it at the sheriff's sale to satisfy her judgment for support payments due her." We held in Porter v. Stanford, supra, that the lower court had authority to order the husband or receiver of community property to pay separate maintenance "pendente lite", and that the property in issue was presumed community until shown otherwise. Pendente lite translates into "[p]ending the suit; during the actual progress

of a suit; during litigation." Black's Law Dictionary, 4th ed., p. 1290. In this case it meant pending determination whether the property was partnership or community property. Our prior decisions did not hold the property to be community. Heretofore, a presumption has never meant the same as a judgment.

It is obvious from A.R.S. § 25-342(B) that the amount of a final judgment for separate maintenance "may be adjudged a lien upon the separate property of the husband." The separate maintenance decree referred only to any community interest of Arnold Porter. This statute fixes the type property upon which a judgment lien in a separate maintenance action may attach, and we should limit the type of property to separate under the doctrine of *inclusio unius est exclusio alterius.* This statute recognized the theory of community property as explained in La Tourette v. La Tourette, 15 Ariz. 200, 137 Pac. 426, that until there is a dissolution of the community by death, annulment or divorce, the wife's interest in the property is identical and inseparable from the husband's. Therefore, a decree for separate maintenance cannot dispose of community property of the parties since the marriage relationship is not terminated. Jacquemart v. Jacquemart, 125 Cal.App.2d 122, 269 P.2d 951; O'Connor v. O'Connor, 91 Cal. App.2d 147, 204 P.2d 916; Ducasse v. Modica, 224 La. 318, 69 So.2d 358; Radermacher v. Radermacher, 59 Idaho 716, 87 P.2d 461. The trial court had no power to dissolve the community and make a division of the property in a separate maintenance action or cause community property to be sold. This rule of law should not be permitted to be circumvented by the issuance of a general execution, a levy on the property and a sale to the appellee. What the court could not directly do by its decree, Gladys Porter could not indirectly accomplish by a sale under a general execution.

Even if we assume that the trial court could permit a lien on any community property of the Porters, it does not follow that the property became community. The past due alimony became vested in Gladys and to this extent was entitled to recognition by the courts. While this was a final judgment, the subsequent exe-

cution could not have determined the ownership of the Hotel.

The judgment was dependent on a contingency and was not a final determination of the contention between all parties. The contingency was that the Hotel would subsequently be judicially declared community property. This fact never occurred.

The general law as to the conclusiveness of a judgment being of prime necessity to a valid execution is:

> "* * * a judgment is not generally considered final where further judicial action is necessary in order fully and finally to settle the rights of the parties, as where the judgment settles only some of several issues of law or fact, or does not dispose of the case as to all the parties; * * * . A judgment is not final which is to become effective only on the happening of a future event or contingency or which is made subject to revision at a future specified date." 49 C.J.S. Judgments § 11, p. 38.

Not only must a judgment be final as between the parties to permit an execution, it must, also, dispose of claims and rights of all the parties. No judgment in this state disposed of the contention by Kemble and the Porter sisters that the property was partnership. Since the separate maintenance decree was final only as to past due alimony between Gladys and Arnold Porter, the Idaho Court was not obligated to give full faith and credit to any alleged determination of the Arizona Hotel property as affecting the Porter sisters. Gladys Porter never held the hotel as her separate property as between her and her husband if the property was later determined to be partnership, and certainly did not hold the property as separate as between her and the Porter sisters or Kemble, by the execution sale. See Miller v. Gregory, 82 Cal.App. 634, 256 Pac. 431; Takahaski v. Kunishima, 34 Cal.App. 367, 93 P.2d 645.

A second reason for reversal of this case is the Idaho decree. Even if we accept Gladys Porter's view that the Idaho court, in decreeing the divorce, failed to give appropriate effect to the ad-

judication made in the former Arizona action, the courts of Arizona are compelled to accord full faith and credit to the Idaho judgment. The asserted denial of the Arizona separate maintenance decree by the Idaho court does not permit or justify retaliation by the courts in Arizona. Gladys Porter's remedy to correct any alleged error was by appeal from the Idaho decree through the Idaho courts, and, if necessary to the Supreme Court of the United States.

The majority opinion adopts the questionable constitutional doctrine that where one state renders a judgment and the parties relitigate the issue in a second state, the original jurisdiction does not have to give full faith and credit to the second conflicting judgment. Support is found for this position in the case of Colby v. Colby, 78 Nev. 150, 369 P.2d 1019, cert. denied, 371 U.S. 888, 83 S.Ct. 186, 9L.Ed.2d 122. This decision has been criticized by legal commentators. See, 63 Colum. L. Rev. 560; 31 Geo. Wash. L. Rev. 648; 16 Vand. L. Rev. 193; 15 Stan. L. Rev. 331.

A reading of United States Supreme Court cases does not permit such a tenuous and chimerical distinction. In Sutton v. Leib, 342 U.S. 402, 72 S.Ct. 398, 96 L.Ed. 448, a federal court applying Illinois law in a diversity case was required to give full faith and credit to a New York court's finding that impeached the jurisdiction of a Nevada ex parte divorce since the New York judgment was res judicata. The Court stated the New York "decree is entitled to full faith throughout the Nation, in Nevada as well as in Illinois." In Morris v. Jones, 329 U.S. 545, 67 S.Ct. 451, 91 L.Ed. 488, the state of Illinois was required to give full faith and credit to a Missouri judgment which was subsequent to an Illinois court order staying all suits against an unincorporated insurance association. The case of Treinies v. Sunshine Mining Co., 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 85, held that where parties appear and litigate jurisdiction in one state and then relitigate the same issue in a second state to final judgment, the res judicata doctrine prohibits an assertion in a third action that the first judgment was entitled to full faith and credit in the second juris-

diction. See also, Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278; Roche v. McDonald, 275 U.S. 449, 48 S.Ct. 142, 72 L.Ed. 365. It is my judgment that the above cited cases conclusively answer this question and should be followed in deciding this matter.

Additional support for this position is found in the Restatement of Judgments, 342, which states:

> "Where in two successive actions between the same parties inconsistent judgments are rendered, the judgment in the second action is controlling in a third action between the parties."

Furthermore, subsection (e) of § 42 states:

> "The rule stated in this Section is applicable not only where the actions are brought in the same State, but also where they are brought in different States."

Specifically on point is subsection (d) of the above section which is as follows:

> "The rule stated in this Section is applicable where a question of title to property is raised in the three actions. If in the first action it is held that one of the parties has the title to the property, and in the second action the prior judgment is not alleged or if it is alleged the court erroneously holds that it is not conclusive, and it is held that the other party has the title to the property, then in a third action the judgment in the second action and not the judgment in the first action is conclusive between the parties."

This Court on numerous occasions has stated that in the absence of prior decisions to the contrary, this state will follow the Restatement whenever applicable. See, MacNeil v. Perkins, 84 Ariz. 74, 324 P.2d 211; Bristor v. Cheatham, 75 Ariz. 227, 255 P.2d 173; Ingalls v. Neidlinger, 70 Ariz. 40, 216 P.2d 387; Waddell v. White, 56 Ariz. 525, 109 P.2d 843; Cole v. Arizona Edison Co., Inc., 53 Ariz. 141, 86 P.2d 946; Smith v. Normart, 51 Ariz.

134, 75 P.2d 38. It is not clear why we should deviate from this established rule in the instant case. The law enunciated in the Restatement of Judgments, § 42, is applicable to this matter and should be followed.

Gladys Porter did appeal a portion of the Idaho divorce decree and her single assignment of error to the Supreme Court of Idaho was as follows:

> "The Court erred in enjoining appellant [Gladys Porter] from maintaining or instituting any action or from receiving the benefits of any judgment previously obtained against or affecting the property known as the Arizona Hotel."

The Supreme Court of Idaho upheld the Idaho divorce decree except they modified the decree as to one section. In Porter v. Porter, 84 Idaho 400, 373 P.2d 327, that Court stated:

> "Section 17 of the judgment enjoins the appellant 'from maintaining, prosecuting or instituting any action against the plaintiff or intervenors affecting those properties known as Arizona Hotel from date hereof.' This enjoinder will prevent appellant *from exercising any rights which she may have outside the present action and to all rights which may enure to her in the future by virtue of this decree or otherwise.*
>
> "Appellant should not be precluded from enforcing her rights *under this decree* in this state or any other state *providing she has fulfilled her obligations as provided therein.* To this extent the trial court is directed to amend its decree." [Emphasis added].

The Supreme Court of Idaho discussed the effect of a valid foreign divorce on a prior determination of the right to separate maintenance by a sister state. The court cited the case of Lynn v. Lynn, 302 N.Y. 193, 97 N.E.2d 748, cert. denied, 342 U.S. 849, 72 S.Ct. 72, 96 L.Ed. 640, which held that a Nevada divorce terminated support money obligation imposed by the prior New

York separate maintenance judgment where both parties appeared in the Nevada action. Other states have held the right to support or maintenance does not survive a valid foreign divorce where both parties appear in the divorce action. See e.g., Barber v. Barber, 51 Cal.2d 244, 331 P.2d 628; Lowry v. Lowry, 174 Kan. 526, 256 P.2d 869; Chittick v. Chittick, 332 Mass. 554, 126 N.E.2d 495; Loeb v. Loeb, 118 Vt. 472, 114 A.2d 518. The Idaho Supreme Court then went one step further than termination of the Arizona separate maintenance decree, and discussed the authority of the trial court in prohibiting Gladys Porter from enforcing the pre-existing judgment against that share of the community property awarded Arnold Porter. As to this matter, the Idaho Supreme Court concluded that Gladys Porter submitted to the jurisdiction of the Idaho trial court for determination of her rights, and by so doing, she had submitted her rights under the separate maintenance decree and any other claims or demands to the Idaho court. *Accord,* Gilbert v. Gilbert, 83 Ohio State 265, 94 N.E. 421. This determination cannot be collaterally attacked in this state as it is res judicata.

We are not dealing with a foreign ex parte divorce decree affecting prior support claims. The case presented is where a divorce was granted by a sister state and both parties to the marriage were before the court. The Idaho court was capable, and did, affect the in personam rights of the parties. We are compelled to give full faith and credit to any disposition of the Arizona support claims made by the Idaho court, and cannot adjudicate the support claims since the Idaho court settled the relationship once and for all. Bates v. Bodie, 245 U.S. 520, 38 S.Ct. 182, 62 L.Ed. 444. We must look to the Idaho decree to determine the status of the support rights under the prior Arizona decree, which indicates the support rights were merged in the divorce decree by the Idaho court.

The United States Supreme Court, in Sherrer v. Sherrer, 334 U.S. 343, 351, 68 S.Ct. 1087, 1091, stated: ". . . the requirements of full faith and credit bar a defendant from collaterally

attacking a divorce decree on jurisdictional grounds in the courts of a sister State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issue, and where the decree is not susceptible to such collateral attack in the courts of the State which rendered the decree." See also, Coe v. Coe, 334 U.S. 378, 68 S.Ct. 1094, 92 L.Ed. 1451. Certainly, general appearance is participation for the purpose of this rule. Haden v. Haden, 120 Cal. App.2d 722, 262 P.2d 73.

Gladys Porter appeared personally in Idaho and contested that court's jurisdiction over the Arizona Hotel property. The trial court ruled adverse to her contention and determined ownership of the property. This Court, by the command of the United States Supreme Court in the above cited cases, cannot now determine that the Idaho decree was rendered without jurisdiction.

A third reason why Gladys Porter should not now be permitted to claim an interest in the Arizona Hotel property is her actions in dealing with the property before the Idaho court. Gladys Porter in her counterclaim for divorce in Idaho alleged:

> "* * * that the parties hereto own as community property an interest in the Arizona Hotel located at the corner of Third Avenue and Washington Street in Phoenix, Arizona * * * ;"

Thus, she admitted in her pleadings that the parties own as community property an interest in the Arizona Hotel. The Idaho trial court pursuant to the statutes of that state had jurisdiction to divide the community property of the marriage. Ida. Code § 32-712. Appellee placed the issue squarely before the Idaho court and should not be heard at this late date to contend that Idaho had no jurisdiction.

As a result of the Idaho divorce decree Gladys Porter executed the following documents:

"RELEASE OF JUDGMENT

"COMES NOW the above-named Plaintiff and De-

fendant in Intervention, GLADYS E. PORTER, and hereby releases that certain Judgment and Decree entered by the above-entitled court [Arizona], on the 14th day of May, 1959.

"This release is made in compliance with that certain Judgment and Decree made and entered in that certain action designated as Civil Action No. 18556-A by the District Court of the Eighth Judicial District of the State of Idaho in and for the County of Kootenai on the 28th day of December, 1960."

"ASSIGNMENT

"KNOW ALL MEN BY THESE PRESENTS: That the undersigned, Gladys E. Porter, does hereby sell, assign, set over, transfer and convey unto W. A. Porter, two-thirds of all of her right, title and interest in and to that certain partnership known as the Continental Hotels System; and the said Gladys E. Porter does hereby also sell, assign, set over, transfer and convey unto Pearline Porter and Pauline Porter Leonard, one-sixth each of all of her right, title and interest in and to that certain partnership known as the Continental Hotels System; this assignment being made and given pursuant to that certain Judgment and Decree made and entered by the District Court of the Eighth Judicial District of the State of Idaho in and for the County of Kootenai on the 28th day of December, 1960.

"DATED: February 27, 1961."

"QUITCLAIM DEED

"For Value Received GLADYS E. PORTER
does hereby convey, release, remise and forever quitclaim unto PEARLINE PORTER and PAULINE PORTER LEONARD, an undivided one-sixth interest each in and to all of her right, title and interest in and to the following described premises, to-wit:

> "Lots 1, 3 and 5, Block 74, original townsite of Phoenix according to the maps and records of the County Recorder of Maricopa County, State of Arizona, together with all good will, trade name, fixtures, furniture, furnishings and equipment and all supplies and every incident and appurtenant, including rental agreements, affecting the same. (Also known as the Arizona Hotel) "AND That certain co-partnership known as the Continental Hotels System."

Gladys Porter also executed a quitclaim deed identical to the above conveying an undivided two-thirds interest to Arnold Porter.

Even assuming the majority opinion correct, these instruments conveyed all of Gladys Porter's interest in the Arizona Hotel and released the prior judgment. She has absolutely and unequivocally waived any right, title and interest in the property in dispute. The law does not permit a party to maintain such conflicting positions simultaneously.

Some reliance is placed upon the fact that the Arizona Hotel, being real property, was located in Arizona. This did not deprive the Idaho court of jurisdiction to adjudicate the interests of the various parties before the court and, acting in personam, to make an effective order disposing of the property. We have discussed this matter previously, and our language in Kennedy v. Morrow, 77 Ariz. 152, 268 P.2d 326, is appropriate. It was argued in the *Kennedy* case that a deed executed pursuant to the order of a California court could not operate as an effective conveyance of real property in Arizona. In rejecting this contention, this Court said:

> "The proposition contended for by plaintiff is not the law. When equity has jurisdiction of the parties it may adjudicate their interests in real property lying outside the territorial jurisdiction, and acting in personam, it will make such orders as the disposition of the case warrants. It is immaterial that the decree of the court could not of

> its own force transfer an interest in the realty, for equity may use its contempt process on the person, and compel the parties to execute deeds, releases, quitclaims, etc., which are effective of their own force." 77 Ariz. at 161, 268 P.2d at 333.

This same principle was enunciated in Butterfield v. Nogales Copper Co., 9 Ariz. 212, 80 Pac. 345, and reiterated in Santa Cruz Ranch v. Superior Court, 76 Ariz. 19, 258 P.2d 413. The same rule has been applied in the State of Idaho. Idaho Gold Mining Co. v. Winchell, 6 Idaho 729, 59 Pac. 533.

The Idaho court did not try title to Arizona real property but merely computed and divided community debts and assets pursuant to personal jurisdiction over the parties. Gladys Porter voluntarily submitted to the jurisdiction of the Idaho court and having submitted her interest in the community estate to that court for determination, should now be bound by its decision. The fact that she deeded away title to the Arizona Hotel property can be of no avail. In addition, the Idaho court found:

> "that the plaintiff [Arnold Porter] is able to pay and that the defendant [Gladys Porter] is entitled to receive the sum of $1200.00 per month as alimony."

Having voluntarily submitted to the jurisdiction of the Idaho court, Gladys Porter cannot complain if the findings of fact and divorce decree are now binding upon her.

The United States Supreme Court has discussed the effect of an in personam judgment concerning real property in a case concerning land lying between Nebraska and Missouri. The Nebraska court litigated the matter and the losing party went to Missouri claiming the land was located in the State of Missouri. The United States Supreme Court in Durfee v. Duke, 375 U.S. 106, 84 S.Ct. 242, 11 L.Ed.2d 186, stated:

> "With respect to questions of jurisdiction over the person, this principle was unambiguously established in Baldwin v. Iowa State Traveling Men's Assn., 283 U.S. 522.

> There it was held that a federal court in Iowa must give binding effect to the judgment of a federal court in Missouri despite the claim that the original court did not have jurisdiction over the defendant's person, once it was shown to the court in Iowa that that question had been fully litigated in the Missouri forum. 'Public policy,' said the Court, 'dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.' 283 U.S., at 525-526.
>
> "Following the *Baldwin* case, this Court soon made clear in a series of decisions that the general rule is no different when the claim is made that the original forum did not have jurisdiction over the subject matter. *Davis* v. *Davis,* 305 U.S. 32; *Stoll* v. *Gottlieb,* 305 U.S. 165; *Treinies* v. *Sunshine Mining Co.,* 308 U.S. 66; *Sherrer* v. *Sherrer,* 334 U.S. 343. In each of these cases the claim was made that a court, when asked to enforce the judgment of another forum, was free to re-try the question of that forum's jurisdiction over the subject matter. In each case this Court held that since the question of subject-matter jurisdiction had been fully litigated in the original forum, the issue could not be retried in the subsequent action between the parties." [Footnotes omitted]

The Court concluded by saying this rule of jurisdictional finality should apply to a case involving real property as between the parties to the litigation.

The majority opinion states, without any authority, that "Divorce actions where the court undertakes to divide community

property both in and out of the forum must be carefully distinguished." There is no reason or logic for such a conclusion. Every case that I have read on this point is just the opposite of the above statement.

The cases of Farley v. Farley, 227 Cal.App.2d 1, 38 Cal.Rptr. 357, cert. denied 379 U.S. 945, 85 S.Ct. 438, 13 L.Ed.2d 543, and Rozan v. Rozan, 129 N.W.2d 694 (N.D.), are illustrative of the usual rule Both cases held that where a divorce court, having in personam jurisdiction over both parties, ordered one party to convey real property located in another state, the courts of the state where the real estate is located must give the entire decree full faith and credit as the facts thus determined are res judicata in the subsequent action.

Also, there can be no question at this date that if a divorce court has in personam jurisdiction over both parties, and orders the execution of a deed by one party, and if that party executed the deed, even under judicial duress or threat of contempt, the deed will convey title even though the land is located in another state. See e.g., Phillips v. Phillips, 224 Ark. 225, 272 S.W.2d 433; Rozan v. Rozan, *supra;* Fall v. Fall, 75 Neb. 120, 113 N.W. 175, aff'd Fall v. Eastin, 215 U.S. 1, 30 S.Ct. 3, 54 L.Ed. 65. The Idaho court as an incident to the divorce action had jurisdiction to determine the rights and liabilities of the community. Gladys Porter, in her pleading, admitted the property was community and thus did not consent to jurisdiction or attempt to confer jurisdiction on the Idaho court.

There is yet another reason why the majority solution should not stand as the law in this area. The result deprives the Porter sisters and Kemble of property without due process of law. This Court, by its decision today, has taken it upon itself to overrule the Idaho court's construction of its own court rules. I question our jurisdiction to make such an implied reversal of that court.

The majority opinion admits that a court may determine the rights of a third party claiming an interest in real property that

is involved in a divorce action. Nevertheless, the solution adopted by this Court, after interpreting the Idaho Rules of Civil Procedure, Rules 14 and 24(A), states there was no common question of law or fact permitting intervention. The ownership of the hotel property was a common disputed fact between Gladys Porter, Arnold Porter, the Porter sisters and Kemble.

The Porter sisters were permitted to intervene in Arizona; Kemble was permitted to intervene in Arizona; both contended the property belonged to the partnership. No determination occurred in the courts of this state as to the character of the property prior to the Idaho court's determination that the Arizona Hotel was partnership property. The Porter sisters intervened in the Idaho divorce action claiming the property was partnership property; Gladys Porter in her pleadings stated the property was community; this was a common question of fact, i.e., the character of the property. This Court now holds the Idaho trial court erred in determining the ownership of the property and permitting the intervention. If there was error in the Idaho divorce action, it was a matter for the Idaho appellate court, not this Court.

Assuming, arguendo, that the Arizona sheriff's sale decided the ownership of the hotel property, which it could not have done, there is no way that it could have affected the rights of the Porter sisters or Kemble. They did not have their day in court in Arizona prior to the Idaho proceedings.

The property labeled Gladys Porter's separate property by the majority was only between Gladys and Arnold Porter and had never been so adjudicated as to the Porter sisters. There was still pending a dispute in Arizona between the parties.

The Idaho trial court had jurisdiction to decide this matter. The subject matter, the divorce proceeding, was before the court; all of the parties claiming ownership to the property, except Kemble, were before the court; and there was no fraud involved.

The first determination of the ownership of the property between Gladys Porter and the Porter sisters was in Idaho. The trial

court rendered a decree finding the property in Arizona belonged to the Continental Hotels System, a co-partnership. The decision was appealed and affirmed except as before mentioned, and the judgment became final. This Idaho judgment is entitled to full faith and credit pursuant to the United States Constitution and statutes enacted thereto.

It is no answer to say the partnership was not a party to the Idaho divorce action or the Continental Hotels System did not appear. Idaho has adopted the Uniform Partnership Act which does not make a legal partnership an independent juristic entity, and whatever recognition is given therein to the entity theory, is solely for procedural or conveyancing purposes. McKinney v. Truck Ins. Exchange, 324 S.W.2d 773 (Mo. App.); Church Budget Envelope Co. v. Cornell, 2 Ohio Opin. 2d 158, 136 N.E.2d 101; Stilgenbaur v. United States, 115 F.2d 283 (9th Cir.); Thomas v. Industrial Comm., 243 Wis. 231, 10 N.W.2d 206. Therefore, there was no requirement that the partnership be a party to the suit. Ida. Code § 5-323; Ida. Rules Civ. Proc. Rule 4(d)(3). Each individual partner of the Continental Hotels System, a co-partnership, was before the court and the Idaho court could adjudicate the rights of the partners.

There is no question the Idaho trial court found the property in issue to be partnership as shown by the following portion of its decree:

> "The court finds that the interest of Pauline Porter Leonard and Pearline Porter in and to the Continental Hotels System, a co-partnership, formerly the Rickett Hotel System, is a bona fide partnership interest therein, having been purchased and acquired by them by the contribution of capital assets in the early formation of said hotel enterprise. The Court further finds that at all times partnership tax returns have been filed with both the Federal and State governments and that the interest of the interveners has at all times been so declared by the records, books and files of said co-partnership."

This finding is determinative of the issues in this appeal and must be given due faith and credit in this State.

For the numerous reasons set forth above, I cannot concur in the decision of this Court in the matter. Any of the single reasons enumerated would be sufficient to reverse this matter and require the lower court to give full faith and credit to the Idaho decree. The majority of this Court pounce upon a result that is not supported by law nor by facts in this matter. This case transcends equitable considerations or retaliatory justice, and must be decided pursuant to the Constitution of the United States. The underlying theory of the full faith and credit clause is to terminate a matter once it has received full consideration on the merits. This case received full consideration on the merits in a sister state. Hence, the judgment of the trial court should be reversed with an order to dismiss appellee's action.

JESSE A. UDALL, Justice

McFARLAND, Justice — Dissenting:

I cannot agree with the result reached by the opinion of the majority. I agree with the third grounds and specific reasons as set forth in the dissent of Justice Udall.

As stated by Justice Udall, Gladys Porter submitted herself to the jurisdiction of the Idaho court and alleged that the parties "own as community property an interest in the Arizona Hotel," thereby placing the issue before the Idaho court.

The majority opinion states that Gladys Porter alleged in her answer that the Arizona Hotel was community property, burdened with a lien, but that two weeks later it was sold under execution sale and became separate property by reason of the sheriff's sale "which fact must have been brought to the attention of the Idaho court" but does not state how it must have been brought to its attention. The records in the instant case include pleadings but not the transcript of testimony; however, the bringing of the matter of the sale to the attention of the Idaho court would not change the situation.

In the instant case Gladys Porter, in her supplemental answer filed after the Idaho judgment, alleged the Idaho court was without jurisdiction to determine ownership to the Arizona property because the property was in custodia legis of the Superior Court of Maricopa County. She also sought a charging order against any interest of Arnold Porter in the Continental Hotels System in the same pleading. She further sought to have the Idaho court give full faith and credit to the separate maintenance decree, alleging there was due and owing to her under said judgment the sum of $23,693.21 and that this amount will increase by $1400 on the first day of May, 1961 and the first day of each month thereafter until said decree is modified or set aside. She asks that the judgment and decree of the Eighth Judicial District Court of the State of Idaho, insofar as it relates to the divorce of the parties and to the support and alimony of a minor child, Tom Clark Porter, and to plaintiff's attorneys' fees and costs, be established as a foreign judgment and that a charging order be issued out of the Superior Court of Maricopa County against the interest of Arnold Porter, also known as W. A. Porter, in the said copartnership known as the Continental Hotels System. She further asks that the said charging order provide that additional payments which became due under the judgment and decree of the Idaho court become a lien against the interest of said Arnold Porter, also known as W. A. Porter, in said Continental Hotels System.

In any event, by her conduct in Idaho, having accepted the benefits of the judgment and decree of the Idaho court, she waived any interest she possessed in the Arizona Hotel property. By signing the quitclaim deeds she is now estopped from claiming any interest in the property. However, the conveyance of her interest in these properties could only convey such interest as she had on the date she signed the quitclaim deeds—on February 27, 1961. This was some nine months after she obtained a deed to the property under the sheriff's sale.

The order of the court under which the property was sold was for separate maintenance and attorneys' fees. The record does not show whether the attorneys' fees were paid by cash or by a conveyance of an interest in the property by Gladys Porter. If by the latter method, her conveyance under the decree of the Idaho court would be subject to whatever incumbrance or conveyance she had previously made of the property to her attorneys.

It is my opinion that the case should be reversed for further proceedings, including the determination of the interest, if any, which Gladys Porter conveyed by her quitclaim deeds.

ERNEST W. McFARLAND, Justice

2. OPINION OF THE ARIZONA COURT OF APPEALS

1 Ariz. App. 363, 403 P.2d 298 (June 21, 1965)

Pearline PORTER and Pauline P. Leonard, Appellants,
George C. Kemble, Appellant,
v.
Gladys E. PORTER, Appellee
1 CA-CIV 27.
Court of Appeals of Arizona.
June 21, 1965.
Rehearing Denied Sept. 2, 1965.

Beer & Polley, by Wesley E. Polley, Phoenix, for appellants Pearline Porter and Pauline P. Leonard.

Kramer, Roche, Burch & Streich, by Charles L. Hardy, Phoenix, for appellant George C. Kemble.

W. Francis Wilson and Richard A. Wilson, Phoenix, for appellee Gladys E. Porter.

CAMERON, Judge.

This is an appeal by Pearline Porter and Pauline P. Leonard, appellants herein, intervenors below, and George Kemble, appellant herein, intervenor below, from a decision of the lower court in favor of Gladys E. Porter. Pearline Porter and Pauline P. Leonard are the twin sisters of Arnold Porter and will be referred to as the Porter sisters. The intervenor, George C. Kemble, will be referred to as Kemble. The facts so far as they are necessary for a determination of this appeal are as follows:

Gladys Porter and Arnold Porter were married in 1940, in Detroit, Michigan, and there are four children, the issue of said marriage. In 1943, Gladys Porter and Arnold Porter and the Porter sisters entered into a partnership agreement concerning the operation of the hotels owned by the parties. In August of that year, a warranty deed conveying property in Phoenix, Arizona, described as the Arizona Hotel, was recorded in Maricopa

County. The deed conveyed title to Arnold and Gladys Porter, husband and wife. The deed did not mention any interest of the Porter sisters.

At this time and thereafter, the marital home of Arnold and Gladys Porter was in Idaho. In December of 1958, Gladys Porter left Idaho to visit in California, and a few weeks later came to Phoenix. In February of 1959, Gladys Porter filed a complaint for separate maintenance in Maricopa County alleging that Arnold Porter was a resident of Idaho and that she was now a resident of Arizona. The complaint also alleged that the property described as the Arizona Hotel was community property. An attachment was issued which was levied upon the Arizona Hotel. The Porter sisters then intervened in the said action, claiming that the Arizona Hotel property was not community property, but that it was partnership property, and that they, the Porter sisters, owned a one-sixth interest each, or a total of one-third, in and to the property described as the Arizona Hotel. The wife petitioned for the appointment of a receiver, and also filed a counterclaim against the Porter sisters as intervenors, denying their allegation, and claiming again that the property was community. A receiver was appointed to run the hotel and later, on 14 May, 1959, a decree of separate maintenance in favor of Gladys Porter, the wife, against Arnold Porter was granted. Arnold Porter, the husband, had not been personally served in Arizona and did not appear in the action.

Thereafter, the intervenor, Kemble, filed a complaint in Cochise County for and on behalf of the Porter children, and against the husband and father, Arnold Porter. Judgment was entered against Arnold Porter in the amount of $135,575.23, on the same day the complaint was filed, 25 May, 1959. Also on the same day, an order was issued out of the Cochise County court charging the judgment against the Arizona property as a partnership. Gladys Porter was not a party to the action in Cochise County.

Also on 25 May, 1959, Arnold Porter filed a complaint for divorce against the wife, Gladys Porter, in the District Court of

the State of Idaho, 18th Judicial District, County Kootenai. Back in Arizona, the Maricopa County Superior Court ordered that the receiver of the Arizona Hotel property pay to the wife, Gladys Porter, the amount of $1,000 per month for support of herself and the minor children until the issue of the ownership could be determined. The Porter sisters and Kemble immediately petitioned the Supreme Court of Arizona for writs of prohibition enjoining the Superior Court from enforcing this order. The alternative writs of prohibition were quashed in the case of Kemble v. Stanford, 86 Ariz. 392, 347 P.2d 28 (1959), and Porter v. Stanford, 86 Ariz. 402, 347 P.2d 35 (1959). As a result of the opinion in the case of Kemble v. Stanford, op. cit., Kemble moved to intervene in the Maricopa County Superior Court case, and the motion was granted. Certiorari to the U. S. Supreme Court was denied in the case of Porter v. Stanford, 371 U.S. 829, 83 S.Ct. 23, 9 L.Ed.2d 66 (1962).

While this matter was being determined by the Arizona Supreme Court, a writ of execution was issued in August, 1959, and at the resulting sheriff's sale, Gladys Porter purchased the interest of Arnold Porter in and to the Arizona Hotel property. In January and February of 1960, the Porter sisters and Kemble moved to vacate and set aside the execution sale, which was denied. The sheriff's deed conveying the Arizona Hotel property was given to Gladys Porter, and in April of 1960, Kemble moved to set aside the sheriff's deed. This motion was also denied and he appealed to the Arizona Supreme Court. The Arizona Supreme Court held in the case of Kemble v. Porter, 88 Ariz. 417, 357 P.2d 155 (1960) that the order denying the motion to set aside the execution sale was not an appealable order and therefore dismissed the appeal.

The scene now shifts back to the State of Idaho where the wife, in July of 1959, had filed an answer and counterclaim in the Idaho divorce action. The Porter sisters also intervened in the Idaho divorce action. Unlike the action in the Maricopa County

Superior Court or the Cochise County Superior Court, the Idaho case found all of the parties to this action, including the husband, appearing and litigating the issues. On 28 December, 1960, after trial in the action, the findings of fact and conclusions of law of the Idaho divorce decree and the decree of divorce, were entered.

The decree granted the divorce to Gladys Porter and divided the community property. Gladys Porter was required and did execute quit claim deeds, assignments and releases, of the Arizona Hotel property in Arizona. This portion of the decree in Idaho was appealed by Gladys Porter. The Idaho Supreme Court upheld the Idaho divorce decree in the case of Porter v. Porter, 84 Idaho 400, 373 P.2d 327 (1962).

In Arizona, Kemble and the Porter sisters filed a supplemental complaint in intervention, praying that the court give full faith and credit to the Idaho divorce decree. Pre-trial was held the 11th day of December, 1961, before the Honorable E. R. Thurman, and the pre-trial order contained the following notation:

"'2' Exemplified copy of Findings of Fact, Conclusions of Law in Idaho Case No. 18556-A

Admitted in Evidence

"'3' Exemplified copy of Judgment and Decree— Idaho Case No. 18556-A

Admitted in Evidence"

Trial before a jury commenced on 18 December, 1961; the only evidence presented was documentary evidence and no one testified. At the trial, exhibits "2" and "3" being exemplified copies of the findings of fact and conclusions of law and the judgment in the Idaho case were offered in evidence. The attorney for Mrs. Gladys Porter objected to the introduction of exhibits "2" and "3" and the transcript reflects a discussion concerning whether or not the exhibits had been admitted in evidence at the pretrial conference. The trial court sustained the objection to the admission of exhibits "2" and "3". The trial court did admit into evidence

deeds signed by Gladys Porter conveying her interest in the Arizona Hotel property to Arnold Porter and the Porter sisters, as well as a release of judgment by which Gladys Porter released the decree of separate maintenance entered in the Maricopa County Superior Court on 14 May, 1959. Kemble and the Porter sisters rested, and Gladys E. Porter moved for a directed verdict which was granted by the court. The formal judgment was entered which provided:

> "Wherefore, it is Ordered and Adjudged that plaintiffs in intervention George C. Kemble, Pauline Leonard and Pearline Porter take nothing by their actions and that defendant, Gladys E. Porter, have judgment against the plaintiffs in intervention and each of them for her costs incurred and expended herein, and that defendant have execution therefore against the property of the plaintiffs in intervention in each of them."

Motion for new trial was filed and denied, and the Porter sisters and Kemble bring this appeal. The receiver heretofore appointed in the separate maintenance action is still in possession of the Arizona Hotel property.

The basic question before this court is this: When real property is located in Arizona and in the possession of the Arizona Superior Court through a receiver, may the Arizona Superior Court refuse to give full faith and credit to a judgment of a court of general jurisdiction of a sister state (Idaho) adjudicating claims to the title of such property when all the parties claiming an interest in the Arizona property were before the Idaho court and submitted to the jurisdiction of the Idaho court.

Article 4, Section 1 of the Constitution of the United States reads as follows:

> "Section 1. Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records,

and Proceedings shall be proved, and the Effect thereof."

Congress has enacted such legislation prescribing the manner in which these records may be proved and the legislation reads in part as follows:

> "The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> "Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." 28 U.S.C.A. § 1738.

We have examined exhibits "2" and "3", being the exemplified copy of the findings of fact and conclusions of law of the Idaho District Court, and the exemplified copy of judgment and decree in Idaho District Court and we find that they comply with the constitution and statutes thereof. We believe that it was error for the trial court to exclude such exhibits from evidence.

It should be noted that all of the parties involved were present and appeared by person and by counsel in the Idaho court. We hold that in the instant case the Arizona Superior Court must, under the full faith and credit clause of the United States Constitution and statutes enacted thereto, give full faith and credit to the decree of a sister state. This extends to land or real property situated within the jurisdiction of the Arizona court:

> "We think, however, that where the court of a sister state, having jurisdiction of the person of the defendants and jurisdiction to bind their consciences, enters a decree ordering a conveyance of land located in Wisconsin, the

findings of fact supporting such a decree must be given the effect of *res adjudicata.*" Bailey v. Tully, 242 Wis. 226 at 233, 7 N.W.2d 837 at 840, 145 A.L.R. 578 (1943).

And:

"It is a settled doctrine that a court of equity, having acquired jurisdiction over the person of the defendant, has jurisdiction to enter any decree which may concern or affect lands situated in a foreign state to the same extent and as fully as though these were situated within the state where the court has its *situs.*" Butterfield v. Nogales Copper Co., 9 Ariz. 212 at 216, 80 P. 345, at 347 (1905).

That there is a decree of separate maintenance in the Arizona court is not, in our opinion, binding upon the Idaho court where in the Arizona decree the husband was not subject to *in personam* jurisdiction and did not actively participate in that decree. As was stated by the Idaho Supreme Court:

"New York considered this question in Lynn v. Lynn, 302 N.Y. 193, 97 N.E.2d 748, [28 A.L.R.2d 1335]. In that case Mrs. Lynn in 1942 secured a separate maintenance decree which provided $85.00 per month for herself and child. In 1943 the husband commenced an action for divorce in Nevada wherein the wife appeared personally and by counsel. Upon trial of the cause the Nevada court entered a decree of divorce which recited the wife made no claim for alimony or support and which made no provision for support of the wife or child. The New York court held the Nevada divorce terminated support money obligations imposed by the prior New York judgment." Porter v. Porter, supra, 84 Idaho at 407-408, 373 P.2d at 331.

And:

"Appellant, having submitted to the jurisdiction of the court and having submitted her interest in the community estate to the trial court for determination, is now bound

> by that determination." Porter v. Porter, 84 Idaho page 409, 373 P.2d page 332.

Gladys Porter, having submitted herself to the jurisdiction of the Idaho court, cannot now complain if the findings of fact, judgment and orders of that court are now binding upon her. The fact that title to the Arizona Hotel property was deeded away by her upon order of the Idaho court is of no avail. As has also been stated:

> "We are of the opinion that had a request been made the trial court would have had the authority to compel plaintiff to convey her interest, if any, in the real estate in question to defendant because at the time of the trial the court had jurisdiction over the parties. It could have enforced that judgment by proceedings in contempt. However, if plaintiff had failed to execute the deed in compliance with the order of the court the judgment would have been inoperative as to conveying title to the property in Pennsylvania." Hoppe v. Hoppe, 181 Kan. 428 at 433, 312 P.2d 215 at 220 (1957).

In the instant case, Gladys Porter conveyed title to the property as requested by the court, and we feel that that is binding upon Gladys Porter. The United States Supreme Court recently discussed this matter in a case concerning land lying between Nebraska and Missouri. The Nebraska court litigated the matter and the losing party went to Missouri claiming that the land was located in the State of Missouri. The United States Supreme Court discussed the matter as follows:

> "With respect to questions of jurisdiction over the person, this principle was unambiguously established in Baldwin v. Iowa State Travelingmen's Ass'n, 283 U.S. 522, 51 S.Ct. 517, 75 L.Ed. 1244. There it was held that a federal court in Iowa must give binding effect to the judgment to a federal court in Missouri despite the claim that the original court did not have jurisdiction over the defendant's person, once it was shown to the court in Iowa that that

> question had been fully litigated in the Missouri forum. 'Public policy,' said the Court, 'dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest; and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause.'" Durfee v. Duke, 375 U.S. 106 at 111, 84 S.Ct. 242 at 245, 11 L.Ed.2d 186 (1963).
>
> "In Treinies [Treinies v. Sunshine Mining Co., 308 U.S. 66, 60 S.Ct. 44, 84 L.Ed. 85], the rule was succinctly stated: 'One trial of an issue is enough. "The principles of *res judicata* apply to questions of jurisdiction as well as to other issues," as well as to jurisdiction of the subject matter as of the parties.'" 375 U.S. 106 at 113, 84 S.Ct. at 246.

The court went on to say:

> "While this Court has not before had occasion to consider the applicability of the rule * * * to a case involving real property, we can discern no reason why the rule should not be fully applicable." 375 U.S. 106 at 114, 84 S.Ct. 242 at 247.

Gladys Porter further contends that since the Arizona Hotel property is in the possession of the Maricopa County Superior Court through a duly appointed and acting receiver, that the Idaho court may not interfere with such possession, and that, therefore, it could not render a judgment in Idaho concerning the Arizona Hotel property. We will concede that the Idaho court may not interfere with property *in custodia legis* of the Maricopa County court. However, the Idaho judgment and decree did not interfere with the possession of the property by the Arizona court. The

deeds executed and delivered by Gladys Porter pursuant to the Idaho judgment and decree, did not in any way interfere with the Arizona court's possession of the Arizona Hotel property, but the Idaho court, having jurisdiction over the parties, cannot be deprived of its right to adjudicate *in personam rights* between these parties, and we hold that the Idaho court having this jurisdiction over the parties, that the Arizona court, under the circumstances, must give full faith and credit to the Idaho decree when the Arizona court determines the interest of the parties in and to the Arizona Hotel property. As has been stated:

> "It appears therefrom that, where one court of competent jurisdiction has taken possession of the *res* involved in an action filed in such court, no other court may interfere with such possession. * * * The rule, however, is limited to actions which deal either directly or potentially with specific property or debts, and, when a suit is strictly *in personam,* with nothing more than a personal judgment sought, there is no conflict with a prior action in another jurisdiction either before or after judgment, even though the same issues are to be tried and determined, the reason of course being that the second suit does not oust the jurisdiction of the court in which the first suit was brought, nor does it lead to a conflict of authority." Forst v. Intermountain B. & L. Ass'n, 49 Ariz. 246 at 253 and 254, 65 P.2d 1379 at 1382 (1937).

Also:

> "Under the doctrine of res judicata an existing final judgment rendered upon the merits, without fault or collusion, by a court of competent jurisdiction, is conclusive as to every point decided therein, and also as to every point raised by the record which could have been decided, with respect to the parties or their privies, Hoff v. City of Mesa, 86 Ariz. 259, 344 P.2d 1013 (1959). Moreover, if two actions involving the same issues and parties are pending at the same time, when a judgment

> in one becomes final it may be raised in bar of the other, regardless of which action was begun first (Citations omitted.)" Day v. Wiswall's Estate, 93 Ariz. 400 at 402, 381 P.2d 217 at 219 (1963).

For reasons stated herein, the matter is hereby reversed and remanded to the trial court for proceedings not inconsistent with this opinion.

STEVENS, C. J., and DONOFRIO, J., concurring.

3. OPINION OF THE IDAHO SUPREME COURT
84 Idaho 400, 373 P.2d 327 (July 12, 1962)

W. A. PORTER, Plaintiff, Cross-Defendant
and Respondents,

v.

Gladys PORTER, Defendant, Cross-Complainant
and Appellant.

Pearline PORTER and Pauline Porter
Leonard, Plaintiffs in Intervention
and Respondents,

v.

W. A. PORTER, Defendant in Intervention
and Respondent

and

Gladys Porter, Defedant in Intervention
and Appellant.

No. 9044.

Supreme Court of Idaho.

July 12, 1962.

Jerry Giesler, Beverly Hills, Cal. (since deceased); Wilson & Wilson, Phoenix, Ariz., Givens, O'Leary, Doane & Givens, Boise, for appellant.

E. L. Miller, Hawkins & Miller, Coeur d'Alene, for respondent.

J. Ward Arney & Pat W. Arney, Coeur d'Alene, for intervenors.

McQUADE, Justice.

This appeal is before this Court upon the judgment roll only. Therein it appears that the trial court entered findings of fact and conclusions of law after having considered oral and documentary evidence. In keeping with the findings of facts and conclusions of law, a decree was entered, from a portion of which this appeal had been taken.

That portion of the decree from which the defendant-appellant takes this appeal is section 17 thereof:

> "It is further ORDERED, ADJUDGED AND DECREED that the defendant shall dismiss any and all proceedings by her maintained against the plaintiff or intervenors, and either of them, in the State of Arizona, including the removal of any and all receivers affecting and properties designated herein as the Arizona Hotel, and that she shall be and is hereby enjoined from maintaining, prosecuting or instituting any action against the plaintiff or intervenors affecting those properties known as the Arizona Hotel from date hereof, and shall further release any judgment or judgments which she has obtained against or affecting said properties known as the Arizona Hotel which she may have acquired."

A motion to dismiss the appeal was made by respondents on the following ground:

> "* * * that it is an attempted partial appeal from a portion of a judgment which portion is not independent, separate and distinct from the entire Judgment."

Appellant's single assignment of error is as follows:

> "The court erred in enjoining appellant from maintaining or instituting any action or from receiving the benefits of any judgment previously obtained against or affecting the property known as the Arizona Hotel."

An appeal may be taken from a portion of a judgment by virtue of statutory authorization. I.C. § 13-202. This Court, in Stearns v. Strom, 68 Idaho 392, 195 P.2d 337, applied the rule from 8 Bancroft's Code Practice, sec. 6267, p. 8325, at p. 8326, relating to separability of a judgment as applied to our statute:

> " 'The rule, however, is subject to the limitation that the part of a judgment from which an appeal is taken must be separable from the remainder, or, in other words, the part whereby the appellant is aggrieved must be so

> far distant and independent that it may be adjudicated on appeal without bringing up for review the entire judgment or order. Unless the part of the judgment appealed from is separate and distinct from the other issues with which the judgment deals, there is an objection in limine in that the statute directs the appellate court to affirm, modify or reverse the judgment of the trial court, or to order a new trial, and this provision cannot be obeyed while a portion of the case remains in the trial court; in such case, therefore, an appeal from part of the judgment will be dismissed. * * *' "

Appellant contends that the restriction is in excess of the courts equity powers and wrongfully restricts her right to enforce the Idaho judgment in Arizona by the usual proceedings on execution. Considered solely as a jurisdictional question we conclude that the appeal taken from only a portion of the judgment is severable from the remainder, although it is closely related to the trial court's division of community property. The respondents motion to dismiss the appeal is therefore denied.

There being no transcript of the proceedings, it is necessary to set forth appropriate portions of the trial court's findings of fact:

> "Plaintiff and defendant are husband and wife, having been intermarried on June 1, 1940, at Detroit, Michigan.
>
> "As issue of the marriage of plaintiff and defendant, there have been born four children, three of which children are now minors, to-wit:
>
> WILLIAM A. PORTER, Jr., age 17,
>
> RICHARD PORTER, age 14, and
>
> TOM CLARK PORTER, age 4.
>
> "The intervenors are sisters of plaintiff and are residents of the State of California.
>
> "All parties have appeared generally herein and have sought affirmative relief from the court herein.

"The minor children, issue of the marriage of plaintiff and defendant, as in Finding No. III found, have been, during said proceeding, within the State of Idaho, and subject to the orders of this court. The court finds that it has personal jurisdiction of all parties to this proceeding and personal jurisdiction of the three minor children of the plaintiff and defendant.

"The plaintiff and defendant were residents of Kootenai County, State of Idaho, residing at Hayden Lake, Idaho, with their family, until December, 1958, at which time the defendant left the marital home. The plaintiff has been continuously a resident of the State of Idaho throughout, until time of trial.

"Prior to the marriage of plaintiff and defendant, and during the marriage, the plaintiff, intervenors, and a half-brother of plaintiff and intervenors, Andy Rickett, were engaged in the hotel business, owning and operating hotels in various states under corporate and partnership ownerships. That one of the partnership ownerships were styled Rickett Hotel System, a copartnership, which, in 1948, changed the name from Rickett Hotel System to Continental Hotel System, a copartnership.

"Ownership of stock in the various corporations except for qualifying shares, were held equally by the community of the plaintiff and defendant, the intervenors and Andy Rickett, the half-brother. The partnership interest in the Rickett Hotel System and as succeeded by the Continental Hotel System, a copartnership, was likewise equally held by the community of the plaintiff and defendant, with the intervenors and Andy Rickett. In 1948 Andy Rickett sold his interest in all stock in the corporations and the partnership interest in the Rickett Hotel *Hotel* System, or the Continental Hotel System, a copartnership, to the community of the plaintiff and defendant, and thereafter

the interest of the community of plaintiff and defendant in and to the Continental Hotel System, a co-partnership, was a 2/3 partnership interest, and the intervenors each held a 1/6 partnership interest in and to the Continental Hotels System, a co-partnership.

"All stock held by the plaintiff and defendant in the various corporations is community property. The 2/3 partnership interest owned by plaintiff and defendant in the Continental Hotels System, a co-partnership, is community property.

"The court finds that the Arizona Hotel, described as follows, to-wit:

* * * * * *

is owned by the Continental Hotels System, a co-partnership, and even though the deed to said properties was taken in the names of plaintiff and defendant herein, said properties were purchased with funds belonging to the partnership known as the Continental Hotel System. All takes and expenses paid thereon were paid by the co-partnership of the Continental Hotel System, and said Arizona Hotel and its allied properties were at all times carried upon the books and records of the co-partnership as an asset thereof.

"The defendant left the marital home of the plaintiff and defendant in Hayden Lake, Idaho, in December of 1958, and thereafter instituted an action in the State of Arizona seeking decree of separate maintenance. The plaintiff was not personally served in that action within the State of Arizona, nor did the plaintiff appear therein. The decree of separate maintenance of the State of Arizona, awarded the defendant money judgment, which the defendant has sought to enforce herein by way of affirmative defense and counter-claim.

"Plaintiff has failed to prove that the defendant was guilty of mental cruelty and the court finds that the plaintiff is not entitled to a divorce by way of his complaint.

"The court further finds that plaintiff has been guilty of conduct toward the defendant causing defendant grievous mental suffering, and that defendant is therefore entitled to a divorce from said plaintiff.

"* * * The court finds that the plaintiff made a gift of said Hayden Lake home unto the defendant, of any community interest he had in and to said property * * *".

* * * * * *

"The court finds that the defendant is a fit and proper person to have the care, custody and control of Tom Clark Porter, age 4, subject to the right of reasonable visitation by the plaintiff herein, and that the plaintiff shall pay unto the defendant for the care, support and maintenance and education of said minor child, the sum of $200.00 per month.

"The court finds that the plaintiff is a fit and proper person to have the care, custody and control of William A. Porter, Jr., age 17, and Richard Porter, age 14, subject to the rights of reasonable visitation by the defendant.

"The court finds that the defedant is entitled and shall be awarded, in addition to her sole and separate properties heretofore found, the following described community property, as her sole and separate property, free and clear of any claim of the plaintiff:

"1. All household furniture located and within the Hayden Lake Home, as heretofore found and described.

"2. One 1953 Oldsmobile automobile in her possession.

"3. All clothing, personal effects and jewelry of Gladys E. Porter, the defendant.

"4. All stock owned by the community of W. A. Porter and Gladys E. Porter, in and to the Rickett Hotels, Inc.,

the Continental System of America, Inc., free and clear of any claims of W. A. Porter.

"5. Four Occidental Life Insurance policies.

"6. All monies due and remaining from the sale of the Boundary County property.

"The court finds that the plaintiff is entitled to have as his sole and separate property, free and clear of any claim of the defendant, subject to the rights of the intervenors, the following described property:

"All right, title, interest and equity that the community of Gladys E. Porter and W. A. Porter had in and to the Continental Hotels System, a co-partnership, being a 2/3 interest in and to said co-partnership. The intervenors own and hold a 1/6 interest each in and to said Continental Hotels System, a co-partnership.

"The plaintiff shall further have as his sole separate property, the following described assets:

"1. One 1959 Cadillac automobile.

"2. His personal effects, including guns, fishing equipment and sports equipment.

"3. All other remaining community property of the plaintiff and defendant not permanently awarded unto the defendant herein.

"The court finds that the interest of Pauline Porter Leonard and Pearline Porter in and to the Continental Hotels System, a co-partnership, formerly the Rickett Hotel System, is a bona fide partnership interest therein, having been purchased and acquired by them by the contribution of capital assets in the early formation of said hotel enterprise. The Court further finds that at all times partnership tax returns have been filed with both the Federal and State governments and that the interest of the intervenors has at all times been so declared by the records, books and files of said co-partnership.

"The court further finds that Pauline Porter Leonard and Pearline Porter were not merely nominal partners or employees of said partnership, but that their interest originated in the beginning of such hotel enterprise and that they have held and now hold stock interest in various corporations to the same extent as their ownership exists in and to the Continental Hotels System, a co-partnership.

"The court finds that the plaintiff is able to pay and that the defendant is entitled to receive the sum of $1200.00 per month as alimony

. "The court finds that the defendant has, by virtue of her actions in the State of Arizona, initiated receivership proceedings as against that property heretofore found and denominated as the Arizona Hotel, belonging to the Continental Hotels System, a co-partnership, and that the defendant shall dismiss all proceedings in the State of Arizona including the removal of the receivership affecting that property denominated as the Arizona Hotel, and that the intervenors should dismiss any and all proceedings or suits they have initiated within the State of Arizona arising out of or in any way affecting that property designated as the Arizona Hotel.

"The court finds that the plaintiff and defendant should transfer by deed unto the intervenors a one-sixth interest each in and to all properties belonging to the Continental Hotels System, a co-partnership, but standing in the name of W. A. Porter and Gladys E. Porter. The court further finds that W. A. Porter and Gladys E. Porter, are trustees for said properties designated as the Arizona Hotel, standing in their names, for the use and benefit of the co-partnership, the Continental Hotels System."

Appellant argues that she is not contesting award of alimony, nor division of community property, but instead is questioning the trial court's restrictions placed upon the enforceability of a

judgment. Appellant denies the trial court's jurisdictional authority to enter a judgment which bears upon the enforceability of the judgment in a sister state.

New York considered this question in Lynn v. Lynn, 302 N.Y. 193, 97 N.E.2d 748. In that case Mrs. Lynn in 1942 secured a separate maintenance decree which provided $85.00 per month for herself and child. In 1943 the husband commenced an action for divorce in Nevada wherein the wife appeared personally and by counsel. Upon trial of the cause the Nevada court entered a decree of divorce which recited the wife made no claim for alimony or support and which made no provision for support of the wife or child. The New York court held the Nevada divorce terminated support money obligations imposed by the prior New York judgment.

The question here advances one step further than termination of a separate maintenance decree. This concerns the fundamental authority of the trial court to divide community property and, in apportionment thereof, to prohibit one of the parties from enforcing a pre-existing judgment against that share of the community awarded to the other spouse.

Ohio, in Gilbert v. Gilbert, 83 Ohio State 265, 94 N.E. 421, 35 L.R.A.,N.S., 521, disposed of a similar problem. In that case, the wife had secured an award for support money in Ohio and several years thereafter appeared in person in a South Dakota divorce action where property rights were considered and concluded. Subsequently, the wife brought an action in Ohio to enforce her rights under the Ohio order. The Ohio court reasoned that the wife had submitted all her rights under the support money order and any other claims or demands to the South Dakota court, and had become estopped again to assert any right she might have had under the original Ohio decree which was determined by the South Dakota court.

Although appellant was a resident of Arizona she submitted to the jurisdiction of the Idaho Court for determination of her

rights. This factor was fundamental in the Lynn case, supra, wherein it was said: "The additional factor present in this case operated to give the Nevada court jurisdiction of the wife's person and, by that token, vested the tribunal with power to adjudicate the wife's right of support as well as the parties' marital status. That being so, our conclusion is here compelled by command of the full faith and credit clause, for, as the Supreme Court had recently declared, Sherrer v. Sherrer, supra, 334 U.S. 343, 355, 68 S.Ct. 1087, 1093 [92 L.Ed. 1429], 'If in its application local policy must at times be required to give way, such "is part of the price of our federal system." Williams v. North Carolina, 1942, 317 U.S. 287, 302, 63 S.Ct. 207, 215 [87 L.Ed. 279].'"

Appellant in arguing this case advances the theory that the trial court tried the title to the Arizona property. We do not agree with such reasoning as it appears the court was computing and dividing the community debts and assets pursuant to in personam jurisdiction of the parties.

Paragraph 17 of the judgment makes specific reference to these matters. Appellant, having submitted to the jurisdiction of the court and having submitted her interest in the community estate to the trial court for determination, is now bound by that determination. No appeal was taken by appellant from the distribution of the community estate as allocated by the district court.

Section 17 of the judgment enjoins the appellant "from maintaining, prosecuting or instituting any action against the plaintiff or intervenors affecting those properties known as Arizona Hotel from date hereof." This enjoinder will prevent appellant from exercising any rights which she may have outside the present action and to all rights which may enure to her in the future by virtue of this decree or otherwise.

Appellant should not be precluded from enforcing her rights under this decree in this state or any other state providing she has fulfilled her obligations as provided therein. To this extent the trial court is directed to amend its decree.

The Judgment is modified and as modified is hereby affirmed. Costs to respondent.

SMITH, C. J., TAYLOR and McFADDEN, JJ., and YOUNG, D. J., concur.

4. SEPARATE MAINTENANCE DECREE OF SUPERIOR COURT, MARICOPA COUNTY, ARIZONA

(May 14, 1959)
(A.R., pp. 31-36.)

(Title of Action)

DECREE OF SEPARATE MAINTENANCE

This cause, coming on regularly to be heard on the 14th day of May, 1959, before the Court sitting without a jury, and GLADYS E. PORTER appearing in person and by her attorneys, WILSON & WILSON, and the defendant appearing neither in person nor by counsel, and it appearing that the defendant was duly served with process herein, to-wit: by publication of the said summons in the Weekly Gazette, a newspaper of general circulation in the County of Maricopa, State of Arizona, the first date of publication being on the 24th day of February, 1959, and the defendant not having answered plaintiff's Complaint herein within the time provided by law, and evidence having been introduced on behalf of said plaintiff at the hearing of this cause, and said cause having been submitted to the Court for its consideration and decision, and the Court having considered same and being fully advised in the law and the premises thereof, the Court finds: That all of the allegations contained in the Complaint are true, and that a decree of separate maintenance should be granted as prayed for in said Complaint.

The Court further finds that the plaintiff is a fit and proper person to have the care, custody, control, and education of the minor children of the parties hereto within the jurisdiction of this Court, to-wit: SANDRA JEAN PORTER, age sixteen (16) years, WILLIAM ARNOLD PORTER, JR., age fifteen (15) years, TOM CLARK PORTER, age three (3) years; the Court further finds that Three Thousand ($3,000.00) Dollars a month for the permanent support and maintenance of the plaintiff and

the minor children of the parties in her care, custody and control, is a reasonable amount to be allowed plaintiff. The Court further finds that, because of the extraordinary and unusual and complicated nature and scope of this matter, the sum of Fifteen Thousand ($15,000.00) Dollars is a reasonable attorneys' fee to be paid plaintiff's counsel, JERRY GIESLER and WILSON & WILSON. The Court further finds that the plaintiff herein has a support order dating from the 1st day of February, 1959, in the sum of Three Thousand ($3,000.00) Dollars as and for attorneys' fees, pendente lite, to plaintiff's attorneys, JERRY GIESLER and WILSON & WILSON, and that the plaintiff should have a lien on the community property of the parties found within the jurisdiction of this Court in the amount of Ten Thousand Two Hundred ($10,200.00) Dollars, being the support due and owing her from the 1st day of February until the 12th day of May, 1959, together with the sum of Five Thousand ($5,000.00) Dollars as and for the attorneys' fees pendente lite. The Court further finds that all of the community property of the plaintiff and defendant located in the State of Arizona should be charged with the support of the plaintiff, and for that purpose any community interest in the Arizona Hotel, being

> Lots 1, 3 and 5 of Block 74, Original townsite of Phoenix, according to the map of record in the office of the County Recorder of Maricopa County, Arizona,

is to be used for the payment of plaintiff's and the minor children's support and maintenance, and should be set aside for that purpose.

THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That plaintiff be and she is hereby authorized to live separate and apart from the defendant.

2. That the plaintiff is to receive for herself and the minor children of the parties hereto, support and maintenance in the sum of Three Thousand ($3,000.00) Dollars per month, commencing on the 15th day of May, 1959, and a like sum on the

15th day of each and every month thereafter until the further order of this Court.

3. That the plaintiff have the care, custody, control and education of the minor children of the parties hereto now within the jurisdiction of this Court, to-wit: SANDRA JEAN PORTER, age sixteen (16) years, WILLIAM ARNOLD PORTER, JUNIOR, age fifteen (15) years, and TOM CLARK PORTER, are three (3) years.

4. That the plaintiff have a lien on all of the community property of the parties hereto for support under a pendente lite order, which has not yet been paid to her, in the sum of Ten Thousand Two Hundred ($10,200.00) Dollars, together with attorneys' fees in the sum of Five Thousand ($5,000.00) Dollars, and court costs pendente lite.

5. That any community interest of the parties hereto in the Arizona Hotel, being

> Lots 1, 3 and 5 of Block 74, original townsite of Phoenix, according to the map of record in the office of the County Recorder of Maricopa County, Arizona,

is hereby charged with payment of the support to the plaintiff, and that the lien hereinabove set forth is to affix to any community interest in the Arizona Hotel.

6. That the plaintiff is to receive the sum of Ten Thousand ($10,000.00) Dollars as and for attorneys' fees, together with her costs herein laid out and expended.

DONE IN OPEN COURT this 14th day of May, 1959.

Judge of the Superior Court
/s/R. C. Stanford, Jr.

(FILED: May 14, 1959.)

5. COMPLAINT IN IDAHO DIVORCE ACTION
(Supp. A.R., pp. 1-11)

PEARLINE PORTER AND PAULINE PORTER LEONARD,
PLAINTIFFS IN INTERVENTION
EXHIBIT NO. 14
(Marked For Identification)

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

No. 18556A
COMPLAINT

W. A. PORTER,

Plaintiff,

vs.

GLADYS PORTER,

Defendant.

Comes now the above-named plaintiff and for cause of action against the above-named defendant complains and alleges:

I.

That plaintiff is and for several years last past has been a bona fide resident of and domiciled in Kootenai County, Idaho, residing at Hayden Lake.

II.

That plaintiff and defendant were married June 1, 1940, at Detroit, Michigan, and ever since have been and now are husband and wife.

III.

That as issue of said marriage there have been born four children whose names and ages are as follows: Sandra Jean, age upwards of sixteen; William A. Porter, Jr., age upwards of fifteen;

Richard Porter, age upwards of twelve, and Tom Clark Porter, age upwards of two years.

That during the month of December, 1958, the defendant, Gladys Porter, without notice to the plaintiff, departed from the home of the parties to this action at Hayden Lake, Idaho, and took with her the minor children, Tom Clark Porter and Sandra Jean Porter, presumptively for spending the Christmas Holidays in Los Angeles, and with the specific understanding that she would return to the home of the parties to this action at Hayden Lake, Idaho, following the Holiday Season.

That William A. Porter, Jr. is attending a Military School in California, but is a resident of and domiciled with the plaintiff at Hayden Lake, Kootenai County, Idaho, and that Richard Porter is living in the home of the parties to this action at Hayden Lake, Idaho, attending school in Kootenai County, Idaho, and is in the actual physical care, custody and control of the plaintiff. That the children, William A. Porter, Jr. and Richard, have expressed desire to this plaintiff that they remain in his absolute care, custody and control and plaintiff alleges that it is for the best interests of the minor children, Tom Clark Porter, and Sandra Jean Porter, that their absolute care, custody and control be awarded to the plaintiff, subject to the order of this Court as to right of reasonable visitation on the part of the defendant, and that upon the ultimate disposition of this case, that reasonable provision be made not only for the custody of the said children but for their care and support.

That the defendant has refused to return to the home of the parties to this action, the domicile of the entire family, and has been traveling in at least the States of California and Arizona, has refused to divulge to the plaintiff her whereabouts and has refused to permit the plaintiff to reasonably communicate with her or with the two minor children, Sandra Jean and Tom Clark Porter, and that this plaintiff has been deprived of the right of communication with said last two named children, and that said

defendant has secreted herself and the children from the plaintiff in either California or Arizona or some other place, although her place of permanent residence and domicile is that of Kootenai County, Idaho.

That except for traveling apparel, so far as is known to this plaintiff, the defendant has left at the home of the parties hereto, at Hayden Lake, Kootenai County, Idaho, all of her personal belongings, clothing, etc.

That the home at Hayden Lake, Idaho, has been maintained continuously for the benefit of the parties to this action and their children, as it was used for the past several years and as it was accepted by the defendant when residing with the plaintiff and their children.

That said defendant has refused to return to the home of the parties hereto, the domicile of the family and their minor children, and has so concealed herself as to make impossible personal contact between the plaintiff and the defendant, and this plaintiff and the two minor children, Sandra Jean and Tom Clark Porter.

That it is for the best interest of the minor children and the parties to this action that the plaintiff be awarded, subject to the further order of this Court, the care, custody and control of all four minor children, Sandra Jean, William A. Porter, Jr., Richard Porter, and Tom Clark Porter. The community property assets, that would provide security for the support, maintenance and education of said minor children, are either situate in or subject to the jurisdiction of the State of Idaho.

There are certain property interests in hotels in various states of the United States; that these interests are many and varied and consist of partnership, leasehold and corporate interests, which either own or operate under lease, hotel properties in various states.

IV.

There are community properties situate in Idaho, including the

home at Hayden Lake, Idaho, which is a substantial and commodious facility and furnished according to the design and plan of the defendant for the convenience of herself, the plaintiff and the minor children.

The other properties include equities in farm properties in Boundary County, Idaho, and equities in stock interests in several corporations, partnership interests, and other equities — principally in hotel properties, either owned or under lease, most of which are operated under the name of "Continental Hotels System"; the home office of which is situate in Coeur d'Alene, Kootenai County, Idaho, which is a mere five miles from the domicile of the parties hereto.

That the community properties referred to are not capable of division and it would be inequitable and disadvantageous to the partners involved in these property interests, as well as to the parties to this action and said minor children, to have the property interests dissolved, and the assets distributed, or the corporate stock interests liquidated, and that to compel such action, except after careful review by this Court, would result in a loss to all of the parties concerned and would adversely affect the security of the minor children.

That it would be equitable for the Court to award to the respective parties interests which would secure their equities, keeping in mind the support, maintenance and education of the minor children, but not so as to destroy the effective and efficient operation of these investments.

That the defendant is wholly incapable of acting as a partner or director, officer or partner in any of said corporations or partnership interests, she having had no experience in the operation or the management of the properties involved, and particularly, the hotel business.

V.

That the defendant has refused to return to the home of the parties hereto, has refused to care for the minor child, Richard,

now with the plaintiff, has conducted herself as to evidence that she is neither mentally or physically competent to care for or provide for said minor children, has deprived plaintiff of companionship and society, has absented herself from the home, deprived the plaintiff of the custody of Tom Clark Porter, and even the right to visit with or see him, and the same is true of Sandra Jean Porter, the oldest child.

That the defendant left the State of Idaho with a design and unjustified purpose to furtively deprive the plaintiff of his parental and marital rights and for the additional purpose of deceiving the plaintiff and attempting to deprive the courts of Idaho of effective jurisdiction of the parties, their children and property rights. That said defendant has by such conduct and procedures embarrassed the plaintiff in his business management and operation of the properties and interest of the parties and this plaintiff's business associates. The defendant has refused to return to the home of the parties hereto, long established at Hayden Lake, and has concealed herself and the minor children, Sandra and Tom Clark, who would normally be residing in the home with these parties, and has deprived the plaintiff of companionship, society, consortium, and has otherwise so conducted herself as to convincingly evidence that she no longer has any real love or affection for the plaintiff and has questionable love and affection for the four minor children, all of which conduct constitutes "EXTREME CRUELTY."

VI.

That plaintiff is willing that there be a fair and equitable division made of the community and other properties of the parties hereto so as to secure the minor children and to assure adequate care and support for them during their minority and concurrently protect the relative equities of the parties hereto, having due regard to the interests of partners, stockholders and creditors in the ventures above-referred to. Many of such properties are incapable of complete division and to compel such would be in-

equitable and disadvantageous to the partners, the parties to this action and the minor children, and would result in a loss to all parties concerned. After a hearing upon the merits in this matter, plaintiff alleges that an award could be made out of income that would provide security for those minor children and still secure the interests of the parties to this action, and their corporate and partner associates and creditors.

WHEREFORE, plaintiff prays for judgment and decree as follows:

1. For an absolute decree of divorce upon the ground of "EXTREME MENTAL CRUELTY."

2. That the Court award to the plaintiff the absolute care, custody and control of the minor children of the parties hereto, and make adequate provision out of the properties of the parties hereto for the care, support, maintenance and education of said minor children.

3. That the Court make an equitable division or distribution of community properties, having in mind the adequate security for the care, maintenance and support of said minor children.

4. For such other and further relief as to the Court may seem just and equitable.

HAWKINS & MILLER
/s/ Wm. S. Hawkins
A member of the firm
Attorneys for Plaintiff
Res. & P.O. Address:
Coeur d'Alene, Idaho

(Verified by Affidavit of W. A. Porter, dated and sworn to May 25, 1959.)

6. ANSWER AND COUNTERCLAIM IN IDAHO DIVORCE ACTION
(Supp. A.R., pp. 12-37.)

(Title of Action.)

ANSWER AND COUNTERCLAIM

COMES NOW the above-named defendant, and by way of answer to the complaint of the plaintiff on file herein admits, denies and alleges as follows:

I.

Defendant denies each and every allegation contained in said compaint not specifically herein admitted, and answering paragraph I of said complaint, admits the allegations contained therein;

II.

Answering paragraph II of plaintiff's complaint, defendant admits the allegations contained therein.

III.

Answering paragraph III of said complaint, defendant admits that there have been born four children as issue of the marriage of the parties hereto, whose names and approximate ages are set forth in said paragraph; admits that during the month of December, 1958, the defendant departed from the home of the parties hereto at Hayden Lake, Idaho, and took with her the minor children, Tom Clark Porter and Sandra Jean Porter; admits that William A. Porter, Jr., was attending a military school in California at the time of the filing of the above-entitled action and is now under the custody and control of the plaintiff; admits that upon ultimate disposition of this case a reasonable provision should be made, not only for the custody of said children, but for their care and support; admits that defendant has refused to return to the home of the parties to this action; admits that she has left considerable of her personal belongings and clothing at the former

residence of the parties hereto at Hayden Lake, Kootenai County, Idaho; admits that there are community property assets that would provide security for the support, maintenance and education of the minor children of the parties hereto; admits that plaintiff and defendant have certain property interests in hotels in various states of the United States; but defendant denies that her departure from Hayden Lake, Idaho, in December, 1958, was without notice to plaintiff; denies there was any specific understanding that she would return to the home of the parties following the holiday season; having no knowledge of any expressed desires of William A. Porter, Jr., and Richard Porter regarding custody, denies that they have expressed a desire to remain in the care, custody and control of the plaintiff, and alleges in this regard that if any such expressions by said children have been made, they were made because of the coercion, persuasion and domination of the plaintiff over said children; denies that it is for the best interests of the minor children, Tom Clark Porter and Sandra Jean Porter, or for the best interests of any of the minor children, that their care, custody and control be awarded to the plaintiff; denies that defendant has refused to divulge to plaintiff her whereabouts, and alleges that plaintiff for some time has been corresponding with defendant and/or her attorneys, has known of the whereabouts of the defendant, and on or about the 30th day of May, 1959, plaintiff came to the residence of the defendant in Phoenix, Arizona, and with the assistance of two strong-armed hired men with force and violence held the defendant and her daughter, Sandra Jean Porter, seized Tom Clark Porter, the three-year-old son of the parties hereto, and took him back to Haydn Lake, Idaho, where, to the best information and belief of the defendant, he is now residing with the plaintiff; denies each and every other allegation in said paragraph containd.

IV.

Answering paragraph IV of said complaint, defendant admits that there are community properties situated in Idaho, including a substantial and commodious home at Hayden Lake, Idaho,

certain farm properties in Boundary County, equities in stock interests in several corporations, partnership interests and other equities, principally in hotel properties either owned or under lease, most of which are operated under the name of Continental Hotels System; denies that the community properties are not capable of division or that it would be inequitable or disadvantageous to the parties or the minor children to have certain of the property interests dissolved and distributed, or that such liquidation would necessarily result in a loss to the parties to this action adversely affecting the security of the minor children; admits that it would be equitable for the Court to award certain property interests to the respective parties hereto and that it would be quite proper to make such awards for the purpose of the support, maintenance and education of the minor children; denies that defendant is wholly incompetent or incapable at all of acting as a director, officer or partner of said corporation or partnership interests, and alleges that her capabilities to act in such action are not dependent upon her experience in the operation or management of hotel properties.

V.

Answering paragraph V of said complaint, defendant admits that she may have convincingly evidenced to plaintiff that she no longer has any real love or affection for him, and alleges that any such loss of affection is the result of plaintiff's acts and misconduct, but denies each and every other allegation in said paragraph contained.

VI.

Answering paragraph VI of said complaint, defendant denies that the plaintiff is willing to be fair and equitable with regard to a division of anything with the defendant; admits that after hearing upon the merits in this matter an award could be made out of the income to provide security for the minor children of the parties hereto and still secure the interests of the parties to this action and their corporate and parnership associates and

creditors; having no knowledge or information as to which properties plaintiff claims to be incapable of complete division, denies that there are any such properties incapable of division, and that such division would be inequitable and disadvantageous to the partners, the parties to this action, or the minor children; denies that such division would necessarily result in a loss to all parties concerned.

AFFIRMATIVE DEFENSE

For a further and separate defense the defendant alleges:

That the right of the defendant, Gladys Porter, to depart from the household of the plaintiff and to remain separate and apart from him and to establish a separate domicile in the State of Arizona and to have the care, custody and control and education of the minor children of the parties hereto, to wit Sandra Jean Porter, William Arnold Porter, Jr., and Tom Clark Porter, has been adjudicated in that certain action brought by the defendant herein against the plaintiff herein for separate maintenance in the Superior Court of the State of Arizona, in and for the County of Maricopa, as case number 55179, which said suit for separate maintenance was instituted on the 13th day of February, 1959, which said State was then and there the separate domicile of the defendant; that said Court is a court of general jurisdiction at and within said State and County and has jurisdiction to try and determine suits for separate maintenance; that in her complaint defendant alleged due and legal grounds therefor as contained in paragraph VI of said complaint in haec verba as follows:

"VI.

"That plaintiff has conducted herself toward the defendant as a good and dutiful wife but notwithstanding the conduct of the plaintiff toward the defendant the defendant has been guilty of excesses, cruel treatment and outrages toward the plaintiff in that defendant has been guilty of extreme physical violence toward plaintiff and has threatened to kill the plaintiff if she employed Mr.

Giesler as her attorney; that defendant has been habitually intemperate and the situation can no longer be tolerated by the plaintiff and the same has been, and now is, detrimental to her physical and mental health and well-being,

"That because of these threats plaintiff fears that defendant will do her great bodily harm if he is not restrained from in any way annoying, molesting, harming, or coming about the plaintiff's residence, or wherever she may be found; and plaintiff further represents and shows unto the Court that the giving and notice of application for such temporary restraining order will permit defendant to perform the very acts by him threatened to be committed upon plaintiff and hereby sought to be prevented.",

the defendant praying in said suit that she have a decree from said Court granting her the right to live separate and apart from the plaintiff herein, that she be granted the care, custody and control of the minor children of the parties, and that the plaintiff herein be required to pay support money and attorneys' fees, and further requiring that the Court issue its temporary restraining order; that thereafter such proceedings were had in said Court and cause, that plaintiff herein was duly and regularly served with process according to the laws of the State of Arizona, as defendant therein, and on the 14th day of May, 1959, upon a hearing duly and legally had in open court a judgment and decree was duly given and rendered in said Court and cause in favor of the defendant herein and against the plaintiff herein, authorizing the defendant herein to live separate and apart from the plaintiff herein, requiring the plaintiff herein to pay for the support of the minor children of the parties and the defendant herein, the sum of $3,000.00 per month, commencing on the 15th day of May, 1959, and a like sum on the 15th day of each and every month thereafter; that defendant herein have the care, custody and control and education of the minor children of the parties hereto

then within the jurisdiction of the Court, to wit, Sandra Jean Porter, William Arnold Porter, Jr., and Tom Clark Porter; that defendant herein have a lien on all of the community property of the parties for support under a pendente lite order in the sum of $10,200.00, together with attorneys' fees in the sum of $5,000.00 and court costs pendente lite; that the community interest of the parties hereto and therein in the Arizona Hotel, the legal description of the same being more particularly described in said decree, be charged with payment for the support of the defendant herein, and that said lien was to affix to any community interest in said Arizona Hotel; that defendant herein receive the sum of $10,000.00 as and for attorneys' fees, together with her costs laid out and expended; that a copy of said decree of separate maintenance in said Court and cause, duly certified by Walter S. Wilson, Clerk, and Henry S. Stevens, Judge of the Superior Court of Maricopa County, State of Arizona, is attached hereto marked Exhibit "A" and hereby made a part hereof as though set forth in full.

WHEREFORE, defendant prays that plaintiff take nothing by his complaint, and that she be hence dismissed with her costs.

COUNTERCLAIM

FIRST COUNT

The defendant herein, Gladys Porter, as and for a counterclaim against W. A. Porter, the plaintiff herein, alleges as follows:

I.

That defendant is a resident of Maricopa County, State of Arizona, and plaintiff is a resident of Hayden Lake, Kootenai County, State of Idaho;

II.

That the parties hereto were married on or about the 1st day of June, 1940, at Detroit, Michigan, and now are and at all times since said date have been husband and wife;

III.

That there have been born as issue of the marriage of the

parties hereto four children, namely Sandra Jean Porter, age 16 years, William Arnold Porter, Jr., age 15 years, Richard Porter, age 13 years, and Tom Clark Porter, age 3 years; that said children are all within the jurisdiction in Phoenix, Arizona, more particularly described as Lots 1, 3 and 5 in Block 74, Original Townsite of Phoenix, Arizona, according to the map of record in the office of the County Recorder, Maricopa County, Arizona; children are all within the jurisdiction of this Court, save and except the child, Sandra Jean Porter; that the defendant is a woman of refinement, a good mother and a fit and proper person to have the care, custody and control of the children of the parties hereto;

IV.

That the parties hereto have acquired as community property ownership or leasehold rights in and to approximately eight hotels located in the western States; that the parties hereto own a farm or ranch at Bonners Ferry, Idaho, of approximately 2,500 acres, a home at Hayden Lake, Idaho, valued in excess of $125,000.00; that defendant believes and therefore alleges that she has a community interest in certain other properties controlled by plaintiff, including, but not limited to, stocks, bonds, bank accounts and real property, the whereabouts and description of which are at this time unkown to defendant; that the parties hereto own as community property an interest in the Arizona Hotel located at the corner of Third Avenue and Washington Street in Phoenix Arizona, more particularly described as Lots 1, 3 and 5 in Block 74, Original Townsite of Phoenix, Arizona, according to the map of record in the office of the County Recorder, Maricopa County, Arizona;

V.

That defendant is without funds with which to support herself and the minor children of the parties hereto who are within the jurisdiction of this Court or with which to pay court costs or attorneys' fees, so that she may properly defend herself and

counterclaim as to her legal and equitable intersts in this action;

VI.

That during the marriage of the parties hereto the defendant has conducted herself as a good and dutiful wife, but the plaintiff has disregarded his marriage vows and obligations, and, without just cause or provocation, has been guilty of extreme cruelty by wilfully and knowingly inflicting upon the defendant grievous mental and physical suffering, more particularly as follows, to wit:

> In that from time to time, and particularly during the last few months the parties were living together as husband and wife, the plaintiff has been guilty of excesses, cruel treatment and outrages toward the defendant, has exhibited extreme physical violence toward defendant, has threatened to kill her if she employed Mr. Giesler as her attorney; has been habitually intemperate, has beaten defendant and made other threats and overtures toward taking her life, all without just provocation,

which said acts, together with other acts not herein specifically alleged, caused the defendant to leave the Idaho residence of the parties hereto in December, 1958, in fear for her life and in fear of molestation by plaintiff and in fear for the safety and welfare of the daughter of the parties hereto, Sandra Jean Porter, and the three-year-old son of the parties hereto, viz. Tom Clark Porter;

> That on or about the 30th day of May, 1959, plaintiff, together with two hired strong-armed men, broke into the residence of the defendant in Phoenix, Arizona, one of the men grabbed and held, against her will, the daughter of the parties hereto, viz. Sandra Jean Porter, the other grabbed and held defendant while the plaintiff grabbed the minor son of the parties hereto, to wit, Tom Clark Porter, age 3 years; and by such force and violence and against the will of the defendant and contrary to the order of the Superior Court of the State of Arizona, in and for the County of Maricopa, and against the peace

and dignity of and contrary to the laws of the State of Arizona, plaintiff removed and transferred said minor child, Tom Clark Porter, from the home of the defendant and informed the defendant that she would not see the child again;

which said acts on the part of the plaintiff were calculated to and did cause defendant grievous mental pain and anguish, completely destroying the legitimate objects of matrimony, convincing the defendant that the continuation of the marriage relationship between defendant and plaintiff is useless and futile and can serve only to make defendant unhappy and ill and that plaintiff is an unfit and improper person to have the care, custody and control of the minor children of the parties hereto, and defendant alleges that it is for the best interests of all of the minor children of the parties hereto that their care, custody and conrol be awarded to the defendant herein.

VII.

That defendant has employed attorneys herein, to wit, Jerry Giesler of Beverly Hills, California, Wilson & Wilson of Phoenix, Arizona, and Givens, O'Leary, Doane & Givens, of Boise, Idaho; that it is necessary for the defendant's protection of her interests in this action that all of such attorneys be employed and that plaintiff should be required to pay to defendant for attorneys' fees incurred and to be incurred in this action the sum of $25,000.00; that defendant has been accustomed for the upkeep and maintenance of the household of the parties hereto, and for her support and the support of the minor children, the sum of $3,000.00 per month, and that said sum is a reasonable sum to be awarded to defendant in this action for her support and support of the minor children of the parties hereto; that it is anticipated that this action will be lengthy and complicated, requiring considerable expense to defendant to defend herself and protect her intrests in this action, for transportation, costs of depositions, filing costs, transcript fees and other matters, and that the sum

of $2,500.00 should be granted to her as suit money pendente lite in this action, and upon final hearing an award for her actual costs and expenses should be made; that defendant alleges that upon hearing of this case on its merits the Court should make a proper and equitable decree awarding to defendant as her sole and separate property not less than one-half of the community property of the parties hereto; that an order to show cause should issue requiring the plaintiff to appear on a day certain and show cause, if any he has, why he should not be required to pay to defendant, as and for her support and the support of the minor children pendente lite, the sum of $3,000.00 per month; why that certain order of the above-entitled Court dated May 27, 1959, regarding the care, custody, control, maintenance, support and education of the children of the parties hereto, should not be set aside and held for naught; why plaintiff should not be required to pay to the defendant forthwith the sum of $2,500.00 suit money for the defense and prosecution of this action in her behalf and the sum of $15,000.00 attorneys' fees, pendente lite.

SECOND COUNT

As and for a second count to this counterclaim against W. A. Porter, defendant alleges:

I.

Defendant re-alleges paragraphs I through V of her First Count to this counterclaim as though set forth herein in haec verba.

II.

That at all times hereinafter mentioned, the Superior Court of the State of Arizona, in and for the County of Maricopa, was a court of general jurisdiction over all matters in equity and law, duly created and organized under and by virtue of the laws of the State of Arizona;

III.

That on or about the 13th day of February, 1959, the defendant herein commenced an action for separate maintenance in

said court against plaintiff herein; that at said time and place defendant had established a separate domicile in the State of Arizona; that plaintiff herein was duly and regularly served with process in accordance with the laws of the State of Arizona as defendant therein, and on the 14th day of May, 1959, upon a hearing duly and legally had in open court, a judgment and decree was duly given and rendered in favor of defendant herein and against plaintiff herein whereby defendant was authorized to live separate and apart from plaintiff; plaintiff was required to pay to the defendant for her support and the support and maintenance of the minor children of the parties, the sum of $3,000.00 per month commencing on the 15th day of May, 1959, and a like sum of $3,000.00 each and every month thereafter until further order of the Court; defendant herein was awarded the care, custody, control and education of the minor children of the parties then within the jurisdiction of the Court, to wit: Sandra Jean Porter, William Arnold Porter, Jr., and Tom Clark Porter; defendant was given a lien on all the community property of the parties hereto for her support under a pendente lite order in the sum of $10,200.00, together with attorneys' fees in the sum of $5,000.00, and court costs pendente lite and defendant was to receive from the plaintiff the sum of $10,000.00 as attorneys' fees, together with costs therein laid out and expended;

IV.

That no part of the monies required by the aforesaid decree have been paid to the defendant;

V.

That a copy of said Decree of Separate Maintenance in said court and cause duly certified by Walter S. Wilson, Clerk, and Henry S. Stevens, Judge of the Superior Court of Maricopa County, State of Arizona, is attached hereto marked Exhibit "A" and made a part hereof as though set forth herein in full;

VI.

That with respect to all matters adjudged in said decree and

over which said court had jurisdiction, said decree is entitled to be given full faith and credit by the courts of the State of Idaho and should be established as a foreign judgment by this Court and enforced by this Court in the manner provided by law.

WHEREFORE, defendant and counterclaimant prays judgment against plaintiff and counterdefendant as follows:

FIRST COUNT

1. That the bonds of matrimony heretofore and now existing between plaintiff and defendant be dissolved and the defendant be granted a divorce from the plaintiff on the ground of extreme cruelty, and that each of the parties hereto be restored to the status of single persons;

2. That defendant be awarded the care, custody and control of the minor children of the parties hereto, namely, Sandra Jean Porter, William Arnold Porter, Jr., Richard Porter, and Tom Clark Porter;

3. That plaintiff be required to pay defendant the sum of $3,000.00 per month for the support, maintenance and education of the minor children of the parties hereto and for the support and maintenance of defendant until further order of the Court;

4. That upon final hearing of the above-entitled matter, plaintiff be required to pay to defendant the sum of $2,500.00 suit money in this action together with such additional sums that may have been actually expended by defendant by way of suit money, and the sum of $25,000.00 for attorneys' fees;

5. That defendant be awarded not less than one-half of the community property of the parties hereto within the jurisdiction of this Court;

SECOND COUNT

6. That that certain decree of separate maintenance attached hereto as Exhibit "A" be given full faith and credit by this Court with respect to all matters therein contained and over which the Superior Court of the State of Arizona, in and for the County of Maricopa, had jurisdiction and that the plaintiff be required

to pay, pursuant to said decree, the sum of $3,000.00 per month for the months of May, June and July, 1959, and for each and every month thereafter, together with the sum of $10,200.00 past support monies due defendant under pendente lite order, and $15,000.00 as and for attorneys' fees incurred by defendant in said action, together with interest thereon in the sum of 6% per annum from May 15, 1959; and

7. For such other and further relief as to the Court seems just and proper in the premises.

DATED this 10th day of July, 1959.

JERRY GIESLER
9200 Wilshire Boulevard
Beverly Hills, California
WILSON & WILSON
522 Luhrs Building
Phoenix, Arizona
GIVENS, O'LEARY, DOANE & GIVENS
/s/David Doane
Member of the Firm
Residence & Post Office
Address: 1530 Idaho Street,
Boise, Idaho
ATTORNEYS FOR DEFENDANT

(Certificate of Mailing by David Doane.)

(Attached to the foregoing Exhibit were the following:)

Decree of Separate Maintenance,
Cause No. 55179, Maricopa County, Arizona, Superior Court.
See Page 31, Volume I of the Abstract of Record.

Certificate of Walter S. Wilson dated June 19, 1959.

Certificate of Henry S. Stevens, dated June 19, 1959.

Certificate of Walter S. Wilson, dated June 19, 1959.

Clerk's Certificate of Attestation, by E. W. Larson, dated December 15, 1961.

Certificate of District Judge, Clay V. Spear, dated December 15, 1961.

Certificate of Clerk, E. W. Larson, dated December 15, 1961.

* * *

PEARLINE PORTER AND PAULINE PORTER LEONARD, PLAINTIFFS IN INTERVENTION EXHIBIT NO. 14

(Marked For Identification)

7. FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE IDAHO DIVORCE COURT

(A.R., pp. 300-22.)

PLAINTIFF-INTERVENORS' EXHIBIT NO. 2

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

W. A. PORTER, Plaintiff, vs. GLADYS PORTER, Defendant, and PEARLINE PORTER and PAULINE PORTER LEONARD, Plaintiffs in Intervention, vs. W. A. PORTER and GLADYS PORTER, Defendants in Intervention.	NO. 18556-A FINDINGS OF FACT AND CONCLUSIONS OF LAW STATE OF IDAHO) County of Kootenai) ss. Filed JAN. 3, 1961 at —— o'clock —— M. E. W. LARSON Clerk District Court By Harold E. Plum Deputy

The above-entitled case having come on regularly for hearing upon the complaint of the plaintiff, and answer and counterclaim of defendant, and of the intervenors and answer thereto; the plaintiff appearing in person and by and through his attorney, E. L. MILLER, of Coeur d'Alene, Idaho, the defendant appearing in person and with her attorneys, DAVID DOANE of the firm of Givens, Doane and Givens, Boise, Idaho, and WILSON & WILSON, of Phoenix, Arizona, and the intervenors appearing during the course of trial and being represented by their attorney, J. WARD ARNEY of Coeur d'Alene, Idaho. Whereupon witnesses were sworn and testified for and on behalf of the plaintiff, defendant/counterclaimant, and intervenors, and both oral and documentary evidence having been introduced and received into evi-

dence and the court having considered the evidence, and two recesses having been taken and said case having been concluded on May 6, 1960, subject to the taking of depositions, and said depositions thereafter being duly and regularly taken; and attorneys for all parties having submitted their briefs to the court, and the court having considered all evidence and briefs, now makes and enters herein the following

FINDINGS OF FACT:

I.

Plaintiff and defendant are husband and wife, having been intermarried on June 1, 1940, at Detroit, Michigan.

II.

As issue of the marriage of plaintiff and defendant, there have been born four children, three of which children are now minors, to-wit: WILLIAM A. PORTER, JR., age 17, RICHARD PORTER, age 14, and TOM CLARK PORTER, age 4.

III.

The intervenors are sisters of plaintiff and are residents of the State of California.

IV.

All parties have appeared generally herein and have sought affirmative relief from the court herein. The minor children, issue of the marriage of plaintiff and defendant, as in Finding No. III found, have been, during said proceedings, within the State of Idaho, and subject to the orders of this court. The court finds that it has personal jurisdiction of all parties to this proceeding and personal jurisdiction of the three minor children of the plaintiff and defendant.

V.

Plaintiff and defendant were residents of Kootenai County, State of Idaho, residing at Hayden Lake, Idaho, with their family,

until December, 1958, at which time the defendant left the marital home. The plaintiff has been continuously a resident of the State of Idaho throughout, until time of trial.

VI.

Prior to the marriage of plaintiff and defendant, and during the marriage, the plaintiff, intervenors, and a half-brother of plaintiff and intervenors, Andy Rickett, were engaged in the hotel business, owning and operating hotels in various states under corporate and partnership ownerships. That one of the partnership ownerships was styled Rickett Hotel System, a co-partnership, which, in 1948, changed the name from Rickett Hotel System to Continental Hotels System, a co-partnership.

VII.

Ownership of stock in the various corporations except for qualifying shares, were held equally by the community of the plaintiff and defendant, the intervenors and Andy Rickett, the half-brother. The partnership interest in the Rickett Hotel System and as succeeded by the Continental Hotel System, a co-partnership, was likewise equally held by the community of the plaintiff and defendant, with the intervenors and Andy Rickett. In 1948, Andy Rickett sold his interest in all stock in the corporation and the partnership interest in the Rickett Hotel System, or the Continental Hotel System, a co-partnership, to the community of the plaintiff and defendant, and thereafter the interest of the community of plaintiff and defendant in and to the Continental Hotel System, a co-partnership, was a 2/3 partnership interest, and the intervenors each held a 1/6 partnership interest in and to the Continental Hotels System, a co-partnership.

VIII.

All stock held by the plaintiff and defendant in the various corporations is community property. The 2/3 partnership interest owned by plaintiff and defendant in the Continental Hotels System, a co-partnership, is community property.

IX.

The court finds that the Arizona Hotel, described as follows, to-wit:

> Lots 1, 3, and 5, Block 74, Original Townsite of Phoenix, according to the maps and records of the County Recorder of Maricopa County, State of Arizona, together with all good will, trade name, fixtures, furniture, furnishings, and equipment and all supplies and every incident and appurtenant, including rental agreements, affecting the same.

is owned by the Continental Hotels System, a co-partnership, and even though the deed to said properties was taken in the names of plaintiff and defendant herein, said properties were purchased with funds belonging to the partnership known as the Continental Hotel System. All taxes and expenses paid thereon were paid by the co-partnership of the Continental Hotel System, and said Arizona Hotel and its allied properties were at all times carried upon the books and records of the co-partnership as an asset thereof.

X.

The defendant left the marital home of the plaintiff and defendant in Hayden Lake, Idaho, in December of 1958, and thereafter instituted an action in the State of Arizona seeking decree of separate maintenance. The plaintiff was not personally served in that action within the State of Arizona, nor did the plaintiff appear therein. The decree of separate maintenance of the State of Arizona awarded the defendant money judgment, which the defendant has sought to enforce herein by way of affirmative defense and counterclaim.

XI.

Plaintiff has failed to prove that the defendant was guilty of mental cruelty and the court finds that the plaintiff is not entitled to a divorce by way of his complaint.

XII.

The court further finds that plaintiff has been guilty of conduct

toward the defendant causing defendant grievous mental suffering, and that defendant is therefore entitled to a divorce from said plaintiff.

XIII.

The marital home of the parties, and hereafter described, was purchased with community funds of the plaintiff and defendant, but the deed thereto from the grantors was unto the defendant as grantee, and as her sole and separate property, and as a married woman. The court finds that the plaintiff made a gift of said Hayden Lake Home unto the defendant, of any community interest he had in and to said property, said gift being in nature of atonement for plaintiff's previous conduct, which resulted in the commencement of a suit for divorce in the State of California, and which particular property is described as follows, to-wit:

A part of Lot 7 of Hayden Lake Cottage Sites, Kootenai County, State of Idaho, according to the recorded plat, described as follows:

Commencing at a point on the East line of Lot 7, Hayden Lake Cottage Sites, which point is 306.4 feet South of the Northeast corner of Lot 8, Hayden Lake Cottage Sites, thence South along the East line of Lot 7, a distance of 100 feet to a point; thence westerly 262 feet to a point on the West line of said Lot 7; which point is 101.55 feet North of the Southwest corner of Lot 7; thence North along the West line of Lot 7, 100.55 feet; thence East 262 feet to the point of beginning, together with the dwelling situate thereon and appurtenances thereunto belonging or in any wise appertaining, which said property is assessed as the North ½ of Tax No. 3166:

AND a part of Lot 7, Hayden Lake Cottage Sites, Kootenai County, Idaho, described as follows:

Commencing on the Southeast corner of said Lot 7; thence West along the South line of said Lot 7 a distance of 262

feet, to the Southwest corner of said Lot 7; thence North along the West line of said Lot 101.55 feet to a point; thence East 262 feet to a point on the East line of said Lot 7; thence South 100 feet to the point of beginning.

XIV.

The Court finds that prior to the institution of this litigation, the plaintiff gave unto his daughter, Sandra Jean Porter, a certain diamond ring, when said daughter was a mere baby, and that the parties did, in addition thereto, accumulate certain United States Government bonds, a portion of which bonds have been, during the pendency of this action, redeemed for the purpose of education of the children of the plaintiff and defendant, and that any bonds standing in the name of Sandra Jean Porter and in the possession of the parties hereto should be delivered unto Sandra Jean Porter for her future and further education.

XV.

The court finds that the defendant is a fit and proper person to have the care, custody and control of Tom Clark Porter, age 4, subject to the right of reasonable visitation by the plaintiff herein, and that the plaintiff shall pay unto the defendant for the care, support and maintenance and education of said minor child, the sum of $200.00 per month.

XVI.

The court finds that the plaintiff is a fit and proper person to have the care, custody and control of William A. Porter, Jr., age 17, and Richard Porter, age 14, subject to the rights of reasonable visitation by the defendant.

XVII.

The court finds that the defendant is entitled and shall be awarded, in addition to her sole and separate properties heretofore found, the following described community property, as her sole and separate property, free and clear of any claim of the plaintiff:

1. All household furniture located and within the Hayden Lake home, as heretofore found and described.

2. One 1953 Oldsmobile automobile in her possession.

3. All clothing, personal effects and jewelry of Gladys E. Porter, the defendant.

4. All stock owned by the community of W. A. Porter and Gladys E. Porter, in and to the Rickett Hotels, Inc., the Continental System of America, Inc., free and clear of any claims of W. A. Porter.

5. Four Occidental Life Insurance Policies.

6. All monies due and remaining from the sale of the Boundary County property.

XVIII.

The court finds that the plaintiff is entitled to have as his sole and separate property, free and clear of any claim of the defendant, subject to the rights of the intervenors, the following-described property:

> All right, title, interest and equity that the community of Gladys E. Porter and W. A. Porter had in and to the Continental Hotels System, a co-partnership, being a 2/3 interest in and to said co-partnership.

The intervenors own and hold a 1/6 interest each in and to said Continental Hotels System, a co-partnership.

XIX.

The plaintiff shall further have as his sole and separate property, the following-described assets:

1. One 1959 Cadillac automobile.

2. His personal effects, including guns, fishing equipment and sports equipment.

3. All other remaining community property of the plaintiff and defendant not specifically awarded unto the defendant herein.

XX.

The court finds that that interest of Pauline Porter Leonard and Pearline Porter in and to the Continental Hotels System, a co-partnership, formerly the Rickett Hotel System, is a bona fide partnership interest therein, having been purchased and acquired by them by the contribution of capital assets in the early formation of said hotel enterprise. The court further finds that at all times partnership tax returns have been filed with both the Federal and State Governments and that the interests of the intervenors has at all times been so declared by the records, books and files of said co-partnership.

The court further finds that Pauline Porter Leonard and Pearline Porter were not merely nominal partners or employees of said partnership, but that their interest originated in the beginning of such hotel enterprise and that they have held and now hold stock interest in various corporations to the same extent as their ownership exists in and to the Continental Hotel System, a co-partnership.

XXI.

The court finds that the plaintiff is able to pay and that the defendant is entitled to receive the sum of $1200.00 per month as alimony.

XXII.

The court finds that the defendant has, by virtue of her actions in the State of Arizona, initiated receivership proceedings as against that property heretofore found and denominated as the Arizona Hotel, belonging to the Continental Hotels System, a co-partnership, and that the defendant shall dismiss all proceedings in the State of Arizona including the removal of the receivership affecting that property denominated as the Arizona Hotel, and that the intervenors should dismiss any and all proceedings or suits they have initiated within the State of Arizona arising out of or in any way affecting that property designated as the Arizona Hotel.

XXIII.

The court finds that the plaintiff and defendant should transfer by deed unto the intervenors a one-sixth interest each in and to all properties belonging to the Continental Hotels System, a co-partnership, but standing in the name of W. A. Porter and Gladys E. Porter. The court further finds that W. A. Porter and Gladys E. Porter, are trustees for said properties designated as the Arizona Hotel, standing in their names, for the use and benefit of the co-partnership, the Continental Hotels System.

XXIV.

The court finds that the sum of $12,000.00 is a reasonable sum to be paid unto the defendant's attorneys as attorney fees for professional services rendered in this action.

From the foregoing FINDINGS OF FACT, the court now makes and enters herein the following

CONCLUSIONS OF LAW:

I.

The court has jurisdiction of the parties hereto and subject matter of this action.

II.

As a matter of law, the plaintiff has failed to sustain his burden of proof upon the allegations of his complaint seeking a divorce and is entitled to take nothing thereby.

III.

The defendant, Gladys E. Porter, is entitled to a decree of divorce dissolving, annuling and setting aside forever the bonds of matrimony which have heretofore existed between plaintiff and defendant.

IV.

The Decree of Separate Maintenance of the Superior Court in and for the County of Maricopa, State of Arizona, in Case No.

55179, is not entitled to full faith and credit herein in that the plaintiff was not personally served within the jurisdiction of the State of Arizona court, did not appear therein and the defendant did procure a money judgment against the plaintiff which she sought to enforce herein by virtue of the second count of defendant's counterclaim and of the affirmative defense of her answer. That said second count of defendant's counterclaim as relating to the decree of separate maintenance from the State of Arizona shall be stricken from said answer and counterclaim.

V.

The acquisition of that property known as the Arizona Hotel and more particularly described as follows, to-wit:

> Lots 1, 3 and 5, Block 74, original townsite of Phoenix, according to the maps and records of the County Recorder of Maricopa County, State of Arizona, together with all good will, trade name, fixtures, furniture, furnishings, and equipment and all supplies and every incident and appurtenant, including rental agreements, affecting the same,

in the names of W. A. Porter and Gladys E. Porter, was, as trustees for the co-partnership of the Continental Hotels System.

VI.

The plaintiff shall execute and deliver unto the defendant a good and sufficient transfer and conveyance of all right, title, interest and equity that he has in those properties which by the Findings of Fact heretofore entered have been awarded to the defendant.

VII.

The defendant shall execute and deliver a good and sufficient transfer and conveyance of all right, title, interest and equity that she has in and to those properties which by the Findings of Fact heretofore made have been awarded unto the plaintiff.

VIII.

The plaintiff and defendant shall execute and deliver a good and sufficient transfer and conveyance unto the intervenors of a one-sixth interest each of any and all properties standing in their names belonging to the Continental Hotels System, a co-partnership.

IX.

That if any party fails, neglects and refuses to make any such conveyance which the court has heretofore determined necessary to carry into force and effect the Findings of Fact and Conclusions of Law hereof, that the Clerk of this Court is hereby authorized and empowered, for and on behalf of said party who fails, neglects or refuses to make the same within ten (10) days from the date hereof, to make for and on behalf of said non-assenting party the necessary instrument as heretofore concluded.

DATED this 28th day of December, 1960.

/s/ Robert E. McFarland, District Judge

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

STATE OF IDAHO,)
County of Kootenai,) ss.

CLERK'S CERTIFICATE
OF ATTESTATION

I, E. W. LARSON, Clerk of the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify the foregoing copy of FINDINGS OF FACT & CONCLUSIONS OF LAW in the matter of Porter vs. Porter, 18556-A to be correct copy of the original thereof, now remaining in and forming a part of the records of the office of said Clerk.

In witness whereof I have hereunto set my hand and the seal

of said court, at Coeur d'Alene, Kootenai County, State of Idaho, January 20th, 1961,

/s/ E. W. Larson, Clerk of the District Court

(SEAL)

STATE OF IDAHO,)
County of Kootenai,) ss.

CERTIFICATE OF
DISTRICT JUDGE

I, CLAY V. SPEAR, one of the Judges of the District Courts in and for the Eighth Judicial District of the State of Idaho, do hereby certify that E. W. LARSON, who signed the foregoing Certificate of Attestation, is the duly elected and qualified Clerk of the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Kootenai, and legal custodian of the records and seal of said District Court, that said signature is his genuine handwriting and that all his official acts as such Clerk are entitled to full faith and credit, and I further certify that said certificate of attestation is in due form according to the laws of the State of Idaho.

In witness whereof I have hereunto set my hand and caused the seal of said District Court to be affixed at Coeur d'Alene, Kootenai County, State of Idaho, January 20th, 1961.

(SEAL)

/s/ Clay V. Spear, Judge of the District Court

STATE OF IDAHO)
County of Kootenai,) ss.

CERTIFICATE OF CLERK

I, E. W. Larson, Clerk of the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Kootenai, do hereby certify that CLAY V. SPEAR, who signed the foregoing certificate, now is, and was at the time of the signing and sealing of said certificate, Judge of the District Court, in and for the Eighth Judicial District of the State of Idaho, duly

elected and qualified; and that the signature of said Judge, as it appears signed to the said certificate, is his genuine signature.

In witness whereof I have hereunto set my hand and seal of said District Court of Coeur d'Alene, Kootenai County, State of Idaho, January 20th, 1961.

(SEAL)

/s/ E. W. Larson, Clerk of the District Court

PLAINTIFF-INTERVENORS' EXHIBIT NO. 2

8. JUDGMENT AND DECREE OF IDAHO DIVORCE COURT (A.R., pp. 323-37.)

PLAINTIFF-INTERVENORS' EXHIBIT NO. 3

IN THE DISTRICT COURT OF THE EIGHTH JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

W. A. PORTER, Plaintiff, Defendant. vs. GLADYS PORTER. and PEARLINE PORTER and PAULINE PORTER LEONARD, Plaintiffs in Intervention, vs. W. A. PORTER and GLADYS PORTER, Defendants in Intervention.	No. 18556-A JUDGMENT AND DECREE

THIS MATTER having come on regularly for hearing before the HONORABLE ROBT. E. McFARLAND, District Judge, upon the complaint of the plaintiff and the answer and counterclaim of defendant, and the complaint of the intervenors and the answers thereto, the plaintiff appearing in person and by and through his attorney, E. L. MILLER, of Coeur d'Alene, Idaho, the defendant appearing in person and with her attorneys, DAVID DOANE, of the firm of Givens, O'Leary, Doane & Givens, of Boise, Idaho, and WILSON & WILSON, of Phoenix, Arizona, and the intervenors appearing during the course of trial in person and being represented by their attorney, J. WARD ARNEY, Coeur d'Alene, Idaho; whereupon witnesses were sworn

and did testify for and on behalf of the plaintiff, defendant-counterclaimant, and intervenors, and both oral and documentary evidence having been introduced and received in evidence and the court having considered the evidence and two recesses having been taken, and said cause having been concluded on May 6, 1960, subject to the taking of depositions, and said depositions thereafter having been regularly taken, and pursuant to stipulations of the parties made a part of the record herein, and the court having considered the same and the parties having submitted unto the court all evidence and the court having heretofore made and entered herein its Findings of Fact and Conclusions of Law, now makes and entered herein the following

JUDGMENT AND DECREE:

I.

It is hereby ORDERED, ADJUDGED AND DECREED that the plaintiff shall be and is hereby denied a divorce upon his complaint.

II.

It is hereby ORDERED, ADJUDGED AND DECREED that the defendant be and the same is hereby awarded a decree of divorce from the plaintiff upon the grounds of Extreme Mental Cruelty.

III.

It is hereby ORDERED, ADJUDGED AND DECREED that the care, custody and control of the minor child of the parties, TOM CLARK PORTER, age 4, be and the same is hereby awarded unto the defendant, subject to the right of reasonable visitation by the plaintiff.

IV.

It is hereby ORDERED, ADJUDGED AND DECREED that for the care, support, maintenance and education of the minor child, TOM CLARK PORTER, the plaintiff shall pay unto the

defendant, the sum of TWO HUNDRED and no/100 DOLLARS ($200.00) per month, for the support thereof, commencing November 1, 1960, and thereafter during the minority of said child or until further orders be made and entered herein.

V.

It is further ORDERED, ADJUDGED AND DECREED that the care, custody and control of WILLIAM A. PORTER, JR., a minor, and RICHARD PORTER, a minor, be and the same is hereby awarded unto the plaintiff, subject to the right of reasonable visitation by the defendant.

VI.

It is hereby further ORDERED, ADJUDGED AND DECREED that the defendant is entitled to alimony from the plaintiff in the amount of TWELVE HUNDRED and no/100 DOLLARS ($1200.00) monthly, commencing on November 1, 1960, and thereafter until the defendant remarries.

VII.

It is hereby ORDERED, ADJUDGED AND DECREED that the defendant is awarded judgment against the plaintiff for the sum of TWELVE THOUSAND and no/100 DOLLARS ($12,000.00) attorney fees in addition to those sums heretofore allowed unto the defendant during the course of this proceeding, and shall be further entitled to recover herein costs, including the charges and expenses of the accountant, Dale Don, and the handwriting witness, Luke S. May.

VIII.

It is further ORDERED, ADJUDGED AND DECREED that the following-described property, to-wit:

A part of Lot 7 of Hayden Lake Cottage Sites, Kootenai County, State of Idaho, according to the recorded plat, described as follows:

Commencing at a point on the East line of Lot 7, Hayden Lake Cottage Sites, which point is 306.4 feet South of

the Northeast corner of Lot 8, Hayden Lake Cottage Sites, thence South along the East line of Lot 7, a distance of 100 feet to a point;

thence westerly 262 feet to a point on the West line of said Lot 7; which point is 101.55 feet North of the Southwest corner of Lot 7; thence North along the West line of Lot 7, 101.55 feet; thence East 262 feet to the point of beginning, together with the dwelling situate thereon and appurtenances thereunto belonging or in any wise appertaining, which said property is assessed as the North ½ of Tax No. 3166;

AND a Part of Lot 7, Hayden Lake Cottage Sites, Kootenai County, Idaho, described as follows:

Commencing at the southeast corner of said Lot 7; thence West along the South line of said Lot 7 a distance of 262 feet to the Southwest corner of said Lot 7; thence North along the West line of said Lot 7, 101.55 feet to a point; thence East 262 feet to a point on the East line of said Lot 7; thence South 100 feet to the point of beginning; is the sole and separate property of the defendant, free and clear of any claim of the plaintiff, and of the community of the plaintiff and defendant.

IX.

It is hereby ORDERED, ADJUDGED AND DECREED that the defendant is hereby awarded as her sole and separate property, free and clear of any claim of the plaintiff, the following-described properties, to-wit:

1. All household furniture, located and within the Hayden Lake home, as heretofore awarded and described.

2. One 1953 Oldsmobile automobile in possession of defendant.

3. All clothing, personal effects and jewelry of said defendant.

4. All stock owned by the community of W. A. Porter and Gladys E. Porter, in and to the Rickett Hotels, Inc., the Continental System of America, Inc., free and clear of any claims of W. A. Porter.

5. Four Occidental Life Insurance policies.

6. All monies due and remaining from the sale of the Boundary County property.

X.

It is further ORDERED, ADJUDGED AND DECREED that the Continental Hotels System, a co-partnership, comprised of the community of W. A. Porter and Gladys Porter, and the intervenors, Pauline Porter Leonard and Pearline Porter, is the owner of the following-described real and personal properties, to-wit:

> Lots 1, 3 and 5, Block 74, Original Townsite of Phoenix, according to the maps and record of the County Recorder of Maricopa County, State of Arizona, together with all good will, trade name, fixtures, furniture, furnishings, and equipment and all supplies and every incident and appurtenant including rental agreements affecting the same. (Also known as the Arizona Hotel.)

XI.

It is further ORDERED, ADJUDGED AND DECREED that even though the title to that property denominated as the Arizona Hotel was taken in the name of W. A. Porter and Gladys E. Porter, said property is the property of the co-partnership of Continental Hotels System, and that the plaintiff and defendant took said deed as trustees for and on behalf of the co-partnership known as the Continental Hotels System.

XII.

It is HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff be and the same is awarded all right, title, interest and equity of the community of W. A. Porter and Gladys E. Porter, in and to the co-partnership known as the Continental Hotels

system, which co-partnership owns those properties heretofore described as the Arizona Hotel properties.

XIII.

It is further ORDERED, ADJUDGED AND DECREED that all other community property, belonging unto the community of the plaintiff and defendant, except as has been specifically awarded unto the defendant herein, be and the same is hereby awarded unto the plaintiff, free and clear of any claim, right, title, interest or equity of the defendant, Gladys E. Porter, and in addition thereto, said plaintiff shall have, specifically:

1. One 1959 Cadillac automobile.

2. His personal effects, including guns, fishing equipment, and sports equipment.

XIV.

It is further ORDERED, ADJUDGED AND DECREED that the plaintiff shall execute and deliver unto the defendant a proper transfer of all right, title, interest and equity in and to those properties by this decree awarded unto the defendant herein, and that if the plaintiff fails, neglects and refuses to transfer and convey said properties unto the defendant within ten (10) days from the date hereof, then the clerk of this court is hereby empowered, for and on behalf of the plaintiff, to execute and deliver such transfers and conveyance as are necessary to carry into effect the award and properties herein unto the defendant.

XV.

It is HEREBY ORDERED, ADJUDGED AND DECREED that the plaintiff and defendant shall, within ten (10) days of the date of this decree execute and deliver a transfer and conveyance unto the intervenors and unto each of them, a one-sixth interest each in and to those properties herein designated as the Arizona Hotel and in and to the co-partnership known as the Continental Hotels System, and if the plaintiff and defendant fail, neglect or refuse to execute said conveyance within said ten days

from date hereof, then the clerk of this court is hereby empowered to execute and deliver such conveyance as are necessary to carry into force and effect said judgment.

XVI.

It is hereby ORDERED, ADJUDGED AND DECREED that the defendant shall, within ten (10) days from the date of this decree, execute and deliver unto the plaintiff a transfer and conveyance of all right, title, interest and equity, excepting that conveyed unto the intervenors, that the defendant has in those properties known as the Arizona Hotel and that co-partnership denominated as the Continental Hotels System, and if the defendant fails, neglects or refuses to execute, transfer and convey within the time as herein prescribed, then the clerk of this court is hereby authorized and empowered to execute such transfer and conveyance on behalf of said defendant to carry into effect this judgment.

XVII.

It is further ORDERED, ADJUDGED AND DECREED that the defendant shall dismiss any and all proceedings by her maintained against the plaintiff or intervenors, and either of them, in the State of Arizona, including the removal of any and all receivers affecting the properties designated herein as the Arizona Hotel, and that she shall be and is hereby enjoined from maintaining, prosecuting or instituting any action against the plaintiff or intervenors affecting those properties known as the Arizona Hotel from date hereof, and shall further release any judgment or judgments which she has obtained against or affecting said properties known as the Arizona Hotel which she may have acquired.

XVIII.

It is hereby ORDERED, ADJUDGED AND DECREED that the intervenors shall forthwith dismiss any and all proceedings by them instituted or pending in the courts of the State of Arizona, and that they are hereby enjoined from maintaining, prose-

cuting or instituting any actions therein which affect those properties denominated herein as the Arizona Hotel properties.

XIX.

It is hereby ORDERED, ADJUDGED AND DECREED that the decree of separate maintenance of the State of Arizona, in and for the County of Maricopa, in Cause No. 55179, is not entitled to full faith and credit herein, and it is further ORDERED, ADJUDGED AND DECREED that the motion to strike those matters contained in the affirmative defense of the answer of the defendant, and in the counterclaim of defendant relating unto or predicated thereon be and the same are hereby stricken.

XX.

It is hereby ORDERED, ADJUDGED AND DECREED that Sandra Jean Porter, issue of the marriage of the parties hereto, be and she is hereby awarded that certain diamond ring given to her during her minority by the plaintiff, and is further awarded those Government bonds in possession of either plaintiff or defendant standing in her name.

XXI.

It is further ORDERED, ADJUDGED AND DECREED that defendant do have and recover her costs herein in the amount of $.....

DATED this 28th day of December, 1960.

/s/ Robt. E. McFarland, District Judge

PLAINTIFF-INTERVENORS' EXHIBIT NO. 3

9. DEEDS, ASSIGNMENT, AND RELEASE OF JUDGMENT EXECUTED BY RESPONDENT (A.R., pp. 344-49.)

PLAINTIFF-INTERVENORS' EXHIBIT NO. 5

QUITCLAIM DEED

For value received GLADYS E. PORTER does hereby convey, release, remise and forever quit claim unto PEARLINE PORTER and PAULINE PORTER LEONARD, an undivided one-sixth interest each in and to all of her right, title and interest in and to the following described premises, to-wit: (together with their appurtenances.)

Lots 1, 3 and 5, Block 74, original townsite of Phoenix according to the maps and records of the County Recorder of Maricopa County, State of Arizona, together with all good will, trade name, fixtures, furniture, furnishings and equipment and all supplies and every incident and appurtenant, including rental agreements, affecting the same. (Also known as the Arizona Hotel)

AND That certain co-partnership known as the Continental Hotels System.

(This Quitclaim Deed is made in compliance with that certain Judgment and Decree made and entered in Civil Action No. 18556-A by the District Court of the Eighth Judicial District of the State of Idaho in and for the County of Kootenai on the 28th day of December, 1960.)

Dated: February 27, 1961.

Gladys E. Porter

(Certification of H. S. Sanderson, Notary Public, verifying signature of Gladys E. Porter.)

* * *

PLAINTIFF-INTERVENORS' EXHIBIT NO. 5

PLAINTIFF-INTERVENORS' EXHIBIT NO. 6

QUITCLAIM DEED

For value received GLADYS E. PORTER does hereby convey, release, remise and forever quitclaim unto WILLIAM A. PORTER an undivided two-thirds interest in and to all of her right, title and interest in and to the following-described premises, to-wit: (together with their appurtenances.)

Lots 1, 3 and 5, Block 74, original townsite of Phoenix according to the maps and records of the County Recorder of Maricopa County, State of Arizona, together with all good will, trade name, fixtures, furniture, furnishings and equipment and all supplies and every incident and appurtenant, including rental agreements, affecting the same. (Also known as the Arizona Hotel.)

AND that certain co-partnership known as the Continental Hotels System.

(This Quitclaim Deed is made in compliance with that certain Judgment and Decree made and entered in Civil Action No. 18556-A, by the District Court of the Eighth Judicial District of the State of Idaho in and for the County of Kootenai on the 28th day of December, 1960.)

Dated: February 27, 1961.

Gladys E. Porter

(Certification of H. S. Sanderson, Notary Public, verifying signature of Gladys E. Porter.)

* * *

PLAINTIFF-INTERVENORS' EXHIBIT NO. 6

PLAINTIFF-INTERVENORS' EXHIBIT NO. 7

ASSIGNMENT

KNOW ALL MEN BY THESE PRESENTS: That the undersigned, Gladys E. Porter, does hereby sell, assign, set over, transfer and convey unto W. A. Porter, two-thirds of all of her right, title and interest in and to that certain partnership known as the Continental Hotels System; and the said Gladys E. Porter does

hereby also sell, assign, set over, transfer and convey unto Pearline Porter and Pauline Porter Leonard, one-sixth each of all of her right, title and interest in and to that certain partnership known as the Continental Hotels System; this assignment being made and given pursuant to that certain Judgment and Decree made and entered by the District Court of the Eighth Judicial District of the State of Idaho in and for the County of Kootenai on the 28th day of December, 1960.

DATED: February 27, 1961.

(Certification of signature.)

/s/ Gladys E. Porter
GLADYS E. PORTER

PLAINTIFF-INTERVENORS' EXHIBIT NO. 7

PLAINTIFF-INTERVENORS' EXHIBIT NO. 8

(Title of Action No. 55179, Maricopa County Superior Court, State of Arizona.)

RELEASE OF JUDGMENT

COMES NOW the above-named plaintiff and defendant in intervention, GLADYS E. PORTER, and hereby releases that certain Judgment and Decree entered by the above-entitled court, on the 14th day of May, 1959.

This release is made in compliance with that certain Judgment and Decree made and entered in that certain action designated as Civil Action No. 18556-A by the District Court of the Eighth Judicial District of the State of Idaho in and for the County of Kootenai on the 28th day of December, 1960.

/s/ Gladys E. Porter
Gladys E. Porter

PLAINTIFF-INTERVENORS' EXHIBIT NO. 8

10. PETITIONER KEMBLE'S SUPPLEMENTAL COMPLAINT IN INTERVENTION, ARIZONA SEPARATE MAINTENANCE ACTION (A.R., pp. 96-104.)

(Title of Action)

SUPPLEMENTAL COMPLAINT IN INTERVENTION

Leave having been granted, the plaintiff in intervention, George C. Kemble files this as a Supplemental Complaint against the defendant in intervention, Gladys E. Porter and alleges the following additional facts which have occurred or taken place since the filing of the Complaint in Intervention, to-wit:

I

Heretofore the above-named defendant, Arnold Porter, also known as W. A. Porter, being then a resident and citizen of the County of Kootenai, State of Idaho, commenced an action in the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Kootenai, against the above-named defendant, Gladys E. Porter, praying for an absolute divorce; thereafter the defendant in said action, Gladys E. Porter, being the defendant in intervention in this cause, appeared in said action and filed an Answer and Counterclaim. The plaintiffs in intervention, Pearline Porter and Pauline P. Leonard, the plaintiffs in intervention in the above-entitled action, intervened in said action in the District Court of the Eighth Judicial District of the State of Idaho, and filed their complaint in intervention to which answers were filed by the parties to said action.

II

Thereafter there was a trial of the issues in said action in said District Court of the Eighth Judicial District of the State of Idaho (hereinafter called Idaho Court) at which the plaintiff and the defendant and the intervenors therein, appeared in person and by their respective attorneys and evidence was introduced by the

respective parties. Thereafter on the 28th day of December, 1960, said Idaho Court duly rendered and entered its judgment and decree, a copy of which is attached hereto, hereby referred to, made a part hereof and marked Exhibit A. Said Idaho Court was and is a court of general jurisdiction duly created and organized under and by virtue of the laws and constitution of the State of Idaho and had jurisdiction of the parties to said action and of the subject matter thereof.

III

Said judgment and decree of said Idaho Court has not been stayed or superseded and has never been vacated, modified or set aside. No appeal has been taken from said judgment and decree of said Idaho Court dated December 28, 1960, save and except that the defendant therein, Gladys E. Porter, has filed a Notice of Appeal from Paragraph XVII of said judgment and decree of said Idaho Court, but plaintiff in intervention here is informed and believes that the filing of said Notice of Appeal does not, under the laws of Idaho have the effect of staying or superseding said paragraph of said judgment or any part of said judgment.

IV

The judgment and decree of this Court in the above action dated May 14, 1959, has been released and satisfied by the plaintiff Gladys E. Porter by her certain release which has been recorded in the office of the County Recorder of Maricopa County, Arizona, on March 20, 1961.

V

By quit claim deed dated February 27, 1961, the plaintiff, Gladys Porter, remised, released and quitclaimed to Pearline Porter and Pauline Porter Leonard an undivided one-sixth interest each in and to all the right, title, interest and estate of said Gladys Porter in and to Lots 1, 3 and 5, Block 74, Original Townsite of Phoenix, Maricopa County, Arizona, together with the good will, trade name, fixtures, furniture, furnishings and equipment

and supplies incident and appurtenant to said real property, together with that certain partnership known as Continental Hotels System, which deed was recorded in the office of the County Recorder of Maricopa County, Arizona, on March 20, 1961.

VI

By deed dated February 27, 1961, the plaintiff, Gladys Porter, remised, released and quitclaimed unto William Arnold Porter, the defendant in the above-entitled action, an undivided two-thirds interest in and to all the right, title, interest and estate of Gladys Porter in and to the property and co-partnership particularly described in the preceding paragraph of this Supplemental Complaint in Intervention, and said deed was recorded in the office of the County Recorder of Maricopa County, Arizona, on March 20, 1961.

VII

By an assignment dated February 27, 1961, said Gladys Porter sold, assigned and set over to William A. Porter an undivided two-thirds interest and to Pearline Porter and Pauline Porter Leonard an undivided one-sixth interest each in and to the properties and business of said co-partnership known as Continental Hotels Systems, Inc., and said assignment was recorded in the office of the County Recorder of Maricopa County, Arizona, on March 20, 1961.

VIII

On the 7th day of April, 1960, the Sheriff of Maricopa County, Arizona, issued to the plaintiff, Gladys E. Porter a Sheriff's deed for the property described in Paragraph 2 of the Complaint in Intervention of George C. Kemble. As shown by the records and files in the above-entitled court, said deed was issued after a Sheriff's sale held on August 20, 1959, pursuant to a general Writ of Execution issued out of the above-styled court in the above-entitled action.

WHEREFORE, said plaintiff in intervention prays judgment as follows:

1. That the Arizona Hotel, described as follows:

> Lots 1, 3 and 5, Block 74, Original Townsite of Phoenix, according to the map and record on file in the office of the County Recorder of Maricopa County, State of Arizona, together with all good will, trade name, fixtures, furniture, furnishings and equipment and all supplies in every incident and appurtenant, including rental agreements, affecting the same,

is and was at all times since prior to the filing of the action by the plaintiff herein, owned by the Continental Hotels Systems, a co-partnership comprised of the defendant, Arnold Porter, and the plaintiffs in intervention, Pearline Porter and Pauline P. Leonard.

2. That the charging order of the intervenor, George C. Kemble, Trustee, described in his Complaint in Intervention herein, is prior and entitled to preference over any lien, charging order, claim or other encumbrance or demand in favor of the plaintiff, Gladys E. Porter, in and to the said Arizona Hotel properties last herein above described, and that said Gladys E. Porter does not have any right, title, interest or estate in or to said Arizona Hotel properties.

3. That the sale under execution held on August 20, 1959, by the Sheriff of Maricopa County, Arizona, whereat there was sold to the plaintiff, Gladys E. Porter, the real property hereinabove described situate in Maricopa County, Arizona, be vacated and set aside and that the Sheriff's Certificate of Sale issued and delivered to the plaintiff, Gladys E. Porter, pursuant to said sale under execution be likewise annulled and set aside.

4. That the deed of the Sheriff of Maricopa County, Arizona, to Gladys E. Porter for the Arizona Hotel properties hereinabove described dated on or about April 7, 1960, be vacated, annulled and set aside.

5. That all interest of the defendant, Arnold Porter, also known as W. A. Porter, in and to the Arizona Hotel properties herein-

above described and all property of the partnership Continental Hotels Systems be adjudged to be subject to the charging order in favor of the plaintiff in intervention, George C. Kemble, Trustee, for the payment of a judgment in favor of said George C. Kemble, Trustee, in the sum of $135,575.25 with accrued interest thereon from the date of the said judgment in favor of said intervenor, George C. Kemble, Trustee.

6. That the plaintiff, Gladys E. Porter, and all persons holding under her, be adjudged to be barred and estopped by virtue of said decree of said Idaho Court from claiming any right, title, interest or estate in and to said Arizona Hotel properties prior or superior to the lien and charging order of the plaintiff in intervention, George C. Kemble, Trustee.

7. For such other and further relief as to the Court may seem just and equitable.

(Signature of Counsel.)

(Attached to the foregoing is a document entitled "Judgment and Decree" — subsequently marked Plaintiff-Intervenors' Exhibit No. 3, which is set forth in its entirety at page 323 of this Abstract of Record, and included herein by reference.)

(FILED: April 10, 1961.)

11. PETITIONERS PORTER AND LEONARD'S SUPPLEMENTAL COMPLAINT IN INTERVENTION, ARIZONA SEPARATE MAINTENANCE ACTION (A.R., pp. 124-31.)

(Title of Action)

SUPPLEMENTAL COMPLAINT IN INTERVENTION

Leave having been granted, the plaintiffs in intervention, Pearline Porter and Pauline P. Leonard, file this as a Supplemental Complaint against the defendant in intervention, Gladys E. Porter and allege the following additional facts which have occurred or taken place since the filing of the Complaint in Intervention, to-wit:

I

Heretofore the above-named defendant, Arnold Porter, also known as W. A. Porter, being then a resident and citizen of the County of Kootenai, State of Idaho, commenced an action in the District Court of the Eighth Judicial District of the State of Idaho, in and for the County of Kootenai, against the above-named defendant, Gladys E. Porter, praying for an absolute divorce; thereafter, the defendant in said action, Gladys E. Porter, being the defendant in intervention in this cause, appeared in said action and filed an Answer and Counterclaim. The plaintiffs in intervention, Pearline Porter and Pauline P. Leonard, intervened in said action in the District Court of the Eighth Judicial District of the State of Idaho, and filed their Complaint in Intervention to which answers were filed by the parties to said action.

II

Thereafter there was a trial of the issues in said action in said District Court of the Eighth Judicial District of the State of Idaho (hereinafter called Idaho Court), at which the plaintiff and the defendant and the intervenors therein, appeared in person and by their respective attorneys, and evidence was introduced by

the respective parties. Thereafter, on the 28th day of December, 1960, said Idaho Court duly rendered and entered its judgment and decree, which is made a part hereof by reference (a true copy of which is attached to the Supplemental Complaint in Intervention, filed on the 10th day of April, 1961, by George C. Kemble, plaintiff in intervention, marked Exhibit A in the above cause). Said Idaho Court was and is a court of general jurisdiction duly created and organized under and by virtue of the laws and constitution of the State of Idaho and had jurisdiction of the parties to said action and of the subject matter thereof.

III

Said judgment and decree of said Idaho Court has not been stayed or superseded and has never been vacated, modified or set aside. No appeal has been taken from said judgment and decree of said Idaho Court dated December 28, 1960, save and except that the defendant therein, Gladys E. Porter, has filed a Notice of Appeal from Paragraph XVII of said judgment and decree of said Idaho Court, but plaintiffs in intervention here are informed and believe that the filing of said Notice of Appeal does not, under the laws of Idaho, have the effect of staying or superseding said paragraph of said judgment or any part of said judgment.

IV

The judgment and decree of this Court in the above action dated May 14, 1959, has been released and satisfied by the plaintiff, Gladys E. Porter, by her certain release which has been recorded in the office of the County Recorder of Maricopa County, Arizona, on March 20, 1961.

V

By quitclaim deed dated February 27, 1961, the plaintiff, Gladys Porter, remised, released and quitclaimed to Pearline Porter and Pauline Porter Leonard an undivided one-sixth interest each in and to all the right, title, interest and estate of said Gladys Porter in and to Lots 1, 3 and 5, Block 74, Original Townsite of Phoenix, Maricopa County, Arizona, together with the good will, trade name, fixtures, furniture, furnishings and equipment and

supplies incident and appurtenant to said real property, together with that certain partnership known as Continental Hotels System, which deed was recorded in the Office of the County Recorder of Maricopa County, Arizona, on March 20, 1961.

VI

By deed dated February 27, 1961, the plaintiff, Gladys Porter, remised, released and quitclaimed unto William Arnold Porter, the defendant in the above-entitled action, an undivided two-thirds interest in and to all the right, title, interest and estate of Gladys Porter in and to the property and co-partnership particularly described in the preceding paragraph of this Supplemental Complaint in Intervention, and said deed was recorded in the office of the County Recorder of Maricopa County, Arizona, on March 20, 1961.

VII

By an assignment dated February 27, 1961, said Gladys Porter sold, assigned and set over to William A. Porter an undivided two-thirds interest and to Pearline Porter and Pauline Porter Leonard an undivided one-sixth interest each in and to the properties and business of said co-partnership known as Continental Hotels Systems, Inc., and said assignment was recorded in the office of the County Recorder of Maricopa County, Arizona, on March 20, 1961.

VIII

On the 7th day of April, 1960, the Sheriff of Maricopa County, Arizona, issued to the plaintiff, Gladys E. Porter, a Sheriff's deed for the property described in Paragraph 2 of the Complaint in Intervention of George C. Kemble. As shown by the records and files in the above-entitled court, said deed was issued after a Sheriff's sale held on August 20, 1959, pursuant to a general Writ of Execution issued out of the above-styled court in the above-entitled action.

WHEREFORE, said plaintiffs in intervention pray judgment as follows:

1. That the Arizona Hotel, described as follows:

> Lots 1, 3 and 5, Block 74, Original Townsite of Phoenix, according to the map and record on file in the office of the County Recorder of Maricopa County, State of Arizona, together with all good will, trade name, fixtures, furniture, furnishings and equipment and all supplies in every incident and appurtenant, including rental agreements, affecting the same,

is and was at all times since prior to the filing of the action by the plaintiff herein, owned by the Continental Hotels Systems, a co-partnership comprised of the defendant, Arnold Porter, and the plaintiffs in intervention, Pearline Porter and Pauline P. Leonard.

2. That said Gladys E. Porter does not have any right, title, interest or estate in or to said Arizona Hotel properties.

3. That the sale under execution held on August 20, 1959, by the Sheriff of Maricopa County, Arizona, whereat there was sold to the plaintiff, Gladys E. Porter, the real property hereinabove described situate in Maricopa County, Arizona, be vacated and set aside and that the Sheriff's certificate of sale issued and delivered to the plaintiff, Gladys E. Porter, pursuant to said sale under execution be likewise annulled and set aside.

4. That the deed of the Sheriff of Maricopa County, Arizona, to Gladys E. Porter for the Arizona Hotel properties hereinabove described dated on or about April 7, 1960, be vacated, annulled and set aside.

5. That the plaintiff, Gladys E. Porter, and all persons holding under her, be adjudged to be barred and estopped by virtue of said decree of said Idaho Court from claiming any right, title, interest or estate in and to said Arizona Hotel properties.

6. For such other and further relief as to the Court may seem just and equitable.

(Signature of Counsel.)

(FILED: May 5, 1961.)

12. PROCEEDINGS IN TRIAL COURT SUPERIOR COURT, MARICOPA COUNTY, ARIZONA (A.R., pp. 254-74.)

(Title of Action.)

December 19, 1961:

Division No. 4; Hon. R. C. Stanford, Jr., Judge.

* * * * *

In chambers: Court and respective counsel are present. Court reporter is present.

* * * * *

Let the record show that Mr. Roche [counsel for petitioner Kemble.] states that inasmuch as George C. Kemble is concerned, he intends to rely upon the Idaho judgment on Sec. I of Article 4 of the Constitution of the United States.

* * * * *

10:52 a.m.: Court reconvenes with respective counsel present and jury present in jury box.

Plaintiffs' in intervention case:

Mr. Paul Beer [counsel for petitioners Porter and Leonard.] offers Exhibit 2 (exemplified copy of Findings of Fact) and requests to read portions to the jury.

Mr. Richard Wilson [Counsel for respondent.] objects to the reading of Exhibit 2 and states his reasons and grounds.

Mr. Walter Roché, on behalf of his client, George C. Kemble, also offers Exhibit 2.

ORDER this matter taken under advisement.

Mr. Paul Beer offers Exhibit 3 (exemplified copy of Judgment and Decree) to be admitted. Mr. Walter Roche also offers Exhibit 3.

Mr. Richard Wilson objects to portions of Exhibit 3 and states his grounds and reasons.

Mr. Walter Roche states the exhibits are offered and should be

admitted in toto under Sec. 1 Article 4, Constitution of United States.

ORDER this matter taken under advisement.

Mr. Paul Beer offers Exhibit 5 into evidence (quitclaim).

Mr. Walter Roche also offers Exhibit 5 into evidence.

Mr. Richard Wilson objects to Exhibit 5 being admitted into evidence and states grounds and reasons.

ORDER this matter taken under advisement.

Plaintiffs' in intervention—Leonard and Porter—Exhibit 13 is marked for identification (quitclaim deed).

Mr. Paul Beer offers Exhibit 6 (quitclaim deed) into evidence.

Mr. Walter Roche also offers Exhibit 6 into evidence.

Mr. Richard Wilson objects.

ORDER this matter is taken under advisement.

* * * * *

2:20 p.m.: In Chambers: Court and Mr. W. Francis Wilson, Mr. Walter Roche and Paul Beer are present. Court Reporter Harold Shortridge is present.

ORDER sustaining objections to Exhibits 2 [Exemplified copy of Idaho Court's Findings of Facts and Conclusions of Law], 3 [Exemplified copy of Idaho Judgment and Decree] and 14.

ORDER overruling objections and admitting into evidence Exhibits No. 5, 6, 7 and 4.

ORDER sustaining objections to reading portions of Idaho Statutes and Constitution of Idaho.

* * * * *

February 13, 1962:

Division No. 4; Hon. R. C. Stanford, Jr., Judge.

February 2 Plaintiff's Motion for New Trial (oral argument requested);

February 2 Plaintiff's Motion for Order Under Rule 54(b) oral argument requested):

Respective counsel are present.

FILED: Plaintiff's Memorandum of Points and Authorities.

Nunc pro tunc as of January 24, 1962, this court has determined that there is no just reason for delay and IT IS ORDERED that a final judgment be entered upon the directed verdict in the form provided by said order of January 24, 1962, and the judgment entered on that date.

Respective counsel now present argument on motion for new trial.

Let the record show that motion for new trial be considered in accordance with the order now entered.

IT IS ORDERED that motion for new trial of plaintiffs in intervention is DENIED.

13. PETITIONERS' MOTION FOR NEW TRIAL SUPERIOR COURT, MARICOPA COUNTY, ARIZONA (A.R., pp. 161-64.)

(Title of Action)

MOTION FOR NEW TRIAL

(Oral Argument Requested)

COME NOW the plaintiffs in intervention, Pearline Porter and Pauline P. Leonard, and move the Court to vacate and set aside the verdict of the jury and the judgment of the Court in favor of the defendant in intervention, Gladys E. Porter, and against the plaintiffs in intervention, Pearline Porter and Pauline P. Leonard, upon the following grounds:

(1) The Court erred in directing the jury to return a verdict in favor of the defendant in intervention.

(2) The Court erred in sustaining objections to and rejecting evidence offered by these plaintiffs in intervention.

(3) The verdict is not justified by the evidence.

(4) The judgment is not justified by the evidence.

(5) The judgment is contrary to law, for the reasons (without limiting the scope and generality of this ground):

(a) The deeds, judgment and charging order in evidence, concluded as a matter of law all rights of the defendant in intervention to the property involved.

(b) The findings of fact and conclusions of law of the District Court of the Eighth Judicial District of Idaho (hereinafter collectively called "Idaho judgment") should have been admitted in evidence and given full faith and credit under Section 1 of Article IV of the Federal Constitution.

(c) The Idaho judgment was and is res judicata of the issues here involved with respect to the title of the Arizona Hotel property.

(d) The defendant in intervention, Gladys E. Porter, is estopped from denying the force and effect of the Idaho judgment.

(e) The above-entitled Court had no jurisdiction in the separate maintenance action to determine the respective rights of the plaintiff, Gladys E. Porter, and the defendant, Arnold Porter, as to any property.

(f) The Idaho Court had jurisdiction of the parties and of the subject matter and had the power to determine the rights of the parties to the Arizona Hotel property and to adjudicate a division thereof binding upon the parties to that action as well as the parties to this action.

(g) The above Court had and has no jurisdiction to dispose of partnership property in this action, except by the imposition of a charging order upon the interest of any partner.

(h) The fact that the Arizona Hotel property was under the management of a receiver did not deprive the Idaho Court of jurisdiction and power to adjudicate the rights of the parties, inter sese, to such property, and to enforce its judgment by such actions as it deemed best.

(i) There is no evidence that the Idaho judgment had not become final.

(j) The execution sale to the defendant in intervention and the deed issued to her pursuant to such sale are void and of no force or effect.

(6) The verdict is contrary to law for the reasons and upon the grounds set forth under subdivision 5 of this motion.

(7) The Court erred in directing the jury to return a verdict in favor of the defendant in intervention because the evidence in the record was sufficient to take the case to the jury.

(Signature of Counsel.)

(A Memorandum of Points and Authorities in support of the foregoing motion omitted in this Abstract.)

(FILED: February 2, 1962.)

14. PETITIONER KEMBLE'S MOTION FOR REHEARING IN THE ARIZONA SUPREME COURT

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

PEARLINE PORTER, PAULINE P. LEONARD and GEORGE C. KEMBLE, Trustee, Appellants, vs. GLADYS E. PORTER, Appellee.	NO. 7594 PR MOTION FOR REHEARING

COMES NOW the Appellant, George C. Kemble, Trustee, and respectfully moves the Court for a rehearing in the above-entitled matter for the following reasons:

This Court, by the narrowest of margins, has affirmed a decision below denying full faith and credit to a sister-State judgment. In doing so, a majority of the Court invoked a procedure and numerous principles of law that are clearly and undebatably contrary to Arizona procedural and substantive law and violative of settled principles of full faith and credit announced by the Supreme Court of the United States. This Court should not let such a decision stand.

Accordingly, the purpose of this Appellant's motion for rehearing is to subject the majority opinion to a systematic analysis and critique based upon controlling principles of law that necessarily determine the disposition of the case. Appellant does not in any way intend to abandon the arguments in his Opening and Reply Briefs heretofore filed with this Court in this action, nor does he reiterate those arguments herein.

Briefly stated, it is our present position that the majority opinion, on the one hand, is based upon a mistake as to the record and, secondly, it passes over without discussion Arizona and fed-

eral precedent that require an opposite result. These contentions constitute proper grounds for a motion for rehearing. Bernstein, *The Disposition of Civil Appeals in the Supreme Court,* 5 Ariz. L.Rev. 175, 189 (1964), and cases cited therein.

For convenience sake, the Appellant will first list the several grounds relied upon by the majority. Such a procedure will aid the Court in concluding, as Appellant contends, that those reasons are unsupported by the record and settled law, which law Appellant will discuss in Arguments I and II, below.

In support of its decision denying full faith and credit to the Idaho decree, the majority opinion invokes the following seven reasons:

> (1) The Idaho judgment failed to give full faith and credit to prior Arizona judgments, said judgments amounting to adjudication that Gladys owned as separate property all of the former couples' prior community interest in the hotel property. (pp. 5-6)
>
> (2) The Idaho court acted without jurisdiction in ordering distribution of Gladys' separate property. (pp. 6-7)
>
> (3) The Idaho judgment will not be given greater effect than the prior Arizona judgments recognizing that Gladys could obtain Arnold's interest in the hotel property as her separate property to satisfy her judgment for support payments. (pp. 7-8)
>
> (4) The Idaho court had no power or authority to entertain the sisters' successful intervention action. (pp. 8-9)
>
> (5) Gladys could not, by consent, confer upon the Idaho court jurisdiction over the subject matter, i.e., her separate property interest in the hotel property. (pp. 9-10)
>
> (6) Idaho had no power or authority and was without jurisdiction to establish, quiet, or otherwise directly affect title to the Arizona property. (pp. 10-12)

(7) The Idaho court had no power to adjudicate rights of the Continental Hotels System since the partnership was not a party before that court. (p. 12)

In so holding, the majority of this Court erred fundamentally in at least three important respects:

(1) In apparent disregard of settled Arizona law regarding conclusiveness of the record on appeal, the majority assume (p. 10), without any support whatever in the record, that Gladys informed the Idaho court that the hotel property had become her separate property as a result of the sheriff's sale. (See Argument I. A., below, for discussion and authorities.)

(2) The majority overlooks familiar principles of estoppel that would prevent Gladys from asserting invalidity of the Idaho decree as it relates to the disposition of the hotel property, having alleged before the Idaho court that her interest in the property was a community interest, but now arguing that the Idaho court attempted to distribute her separate property. (See Arguments I. B., below, for discussion and authorities.)

(3) The majority fails to even mention established principles of full faith and credit that render untenable each and every argument invoked by them to deny the Idaho decree the recognition and effect to which it is constitutionally entitled. (See Argument II, below, for discussion and authorities.)

These three basic contentions — based both upon the record before the Court and unquestionable legal and constitutional principles — operate to undercut the whole of the majority opinion reasoning. The Arizona and federal precedent relied upon below absolutely require a new decision, one reinstating the unanimous Court of Appeals opinion and reversing the trial court judgment.

ARGUMENT I

HAVING DEALT WITH THE HOTEL PROPERTY BEFORE THE IDAHO COURT AS COMMUNITY PROPERTY IN PROCURING THE DIVORCE AND PROPERTY DIVISION SHE SOUGHT BY COUNTERCLAIM, GLADYS IS NOW ESTOPPED TO COLLATERALLY ATTACK THE IDAHO DECREE ON THE GROUND THAT THAT COURT DISPOSED OF HER SEPARATE PROPERTY.

A. *The Record Before This Court Does Not Support The Contention That Gladys Informed The Idaho Court In Any Manner That She Purchased Her Husband's Interest In The Hotel Property, Making It Her Separate Property.*

Acknowledging, as they must, that Gladys' Counterclaim in the Idaho divorce proceeding alleged that the Arizona Hotel was community property, the majority nevertheless conclude that her purchase of the property at the subsequent sheriff's sale "must have been brought to the attention of the Idaho court." (p. 10) The entire record before the Court simply does not support such a statement. This Court, in repeated instances, has consistently stated that it is bound by the record on appeal and will not go beyond it. E.g., *State Automobile & Casualty Underwriters* v. *Engler*, 90 Ariz. 321, 367 P.2d 665 (1961); *Day* v. *Wiswall's Estate*, 93 Ariz. 400, 381 P.2d 217 (1963); see Rules 5(b) (4) and (6) and 5(d) of the Supreme Court.

Apart from pure speculation, the only possible basis for the majority's assumption is the statement of Appellee's counsel in her Answer Brief, at page 10, to the effect that during the trial Gladys amended her pleadings to allege the purchase of Arnold's interest at the sheriff's sale. No reference is made to the record to support this statement in spite of the fact that such a reference is required by the rules of this Court cited above. This bald assertion was denied by all Appellants in their Reply Briefs. (Appellant Kemble's Reply Brief, p. 1; Appellant Porters' Reply Brief, pp. 3-4) This Court has held that references by counsel in briefs

to alleged facts not appearing in the record cannot be considered by the Court on review. *Cubbison* v. *Cubbison,* 45 Ariz. 14, 40 P.2d 86 (1935) (Lockwood, C. J.); *Potter* v. *Home Owners' Loan Corp.,* 50 Ariz. 285, 72 P.2d 429 (1937) (Lockwood, J.).

If, in the Idaho proceedings, Gladys had desired to benefit from the intervening Arizona sheriff's sale it was her duty to bring it to that court's attention in some acceptable manner. See *Roche* v. *McDonald,* 275 U.S. 449, 455, 48 S.Ct. 143, 72 L.ed. 365 (1928); *Gardens Suburbs Golf & Country Club* v. *Murrell,* 180 F.2d 435, 436 (5th Cir.), *cert denied,* 340 U.S. 822 (1950); *Lewis* v. *Lewis,* 49 Cal.2d 389, 393, 317 P.2d 987, 990 (1957). This record is barren of any indication whatsoever that this in fact occurred.

Neither the Idaho trial court's Findings of Fact and Conclusions of Law (A.R. 300-322) nor its Judgment and Decree (A.R. 323-337) make any reference whatever to any purported amendment on Gladys' part. The decision of the Idaho Supreme Court, *Porter* v. *Porter,* 84 Idaho 400, 373 P.2d 327 (1952), is likewise silent on this point. It is plain that those courts proceeded upon the assumption that the hotel property was the couples' community property, just as Gladys alleged in her Counterclaim in that action. (Supp. A.R. 24)

This Court should not now depart from universal and very necessary rules of appellate procedure in accepting an unsupported assertion of a party's counsel or in assuming any other matter not of record. As will be seen below, in the argument based upon established principles of full faith and credit (Argument II), it matters not, in the final analysis, whether Gladys did in fact call these matters to the attention of the Idaho courts. But the majority's erroneous assumption that she did bring the facts of the Arizona sheriff's sale to the attention of the Idaho court is central to many of their arguments invoked as reasons for denying full faith and credit to the Idaho decree. Since the record indicates that she did not do so, but instead alleged that the property was the

couples' community property, many of the grounds relied upon in the majority opinion are not available for Gladys to assert because of the settled and fully applicable doctrine of estoppel.

B. *Gladys Is Estopped From Collaterally Attacking The Idaho Decree By Arguing That That Court Disposed Of Her Separate Property When She Treated It As Community Property Before That Court And Now Seeks To Benefit From Other Portions Of That Decree.*

By her Counterclaim (Supp. A.R. 23-37) in the Idaho divorce action, Gladys alleged that she and her then husband owned "as community property an interest in the Arizona Hotel [legal description following]." (Supp. A.R. 24-25) She then prayed that she be granted a divorce from Arnold (Supp. A.R. 34) and that she be awarded not less than one-half of the community property of the parties. (Supp. A.R. 35) The Idaho trial court did grant her the divorce she requested, and, pursuant to Sec. 32-712 of the Idaho Code, divided the community property of the marriage. That Court awarded Gladys substantial alimony — $1,200 a month until remarriage, an allowance for attorney's fees, a lot and house in Idaho, an automobile, corporate stock, life insurance policies and monies due the former community from the sale of other property. (A.R. 329-30) Arnold, on the other hand, was awarded the community interest in the Continental Hotel partnership and the Arizona Hotel properties in addition to the community property not awarded Gladys. (A.R. 331-32) Gladys did not appeal from the division of the community property, see *Porter* v. *Porter,* 84 Idaho 400, 373 P.2d 327 (1962), but instead, and in compliance with the Idaho decree, executed the appropriate documents conveying all of her interest in the hotel property to Arnold and his partners. (A.R. 344-48) Gladys then returned to Arizona and filed a complaint to establish the Idaho decree as a judgment within Arizona, seeking to recover from Arnold the money award made to her by the divorce court. (A.R. 338-43) She thus treated the Idaho decree as a valid judgment insofar as it bestowed benefits upon her. But when the Appellants

returned to Arizona and requested this State's courts to recognize and enforce the Idaho decree as it related to the burdens imposed upon Gladys (A.R. 96-104) she then, for the first time, complained that the Idaho court did not have jurisdiction over the hotel property since it was in custodia legis of the Arizona court.

It is noteworthy that she did not allege lack of jurisdiction on the ground that the Idaho court attempted to dispose of her separate property.

The majority opinion of this Court did not rely upon Gladys' "custodia legis" argument but instead asserted what Gladys did not argue below, i.e., that the Idaho court had no jurisdiction over her separate property.

The Idaho court undertook to equitably divide the community property of the marriage. Both marital parties alleged that their interest in the hotel property was a community interest. The award of that community interest to the husband undoubtedly figured in the court's determination of how much the wife was to receive. Her award in the form of alimony and other community property was surely enhanced because of the fact that the husband received her interest in the Arizona Hotel. The majority opinion allows Gladys to receive the benefits of the property division but avoid its inseparable burden by holding that the portion of the Idaho decree dealing with the hotel property will not be recognized or enforced. In effect, the majority undertake to relitigate the question concerning that part of the marital property award made to Arnold after a competent court of a sister-State had done so at the request of *both* husband and wife, *both* of whom described the hotel property as community property in their pleadings. The opinion wreaks havoc with principles of full faith and credit which prohibit a disappointed participant from relitigating in another State's forum those matters which were or which should have been litigated in another State. If the principles invoked by the majority become the law in Arizona, there is no sanctity in her sister-States' judgments when attacked here. Doing

now for Gladys what she and her counsel could or should have done in Idaho, i.e., set up before that court *all* of the Arizona proceedings and take her appeals there, the majority accomplish *prescisely* that which the Full Faith and Credit Clause prohibits.

Both dissenting Justices properly note that the law of estoppel prevents Gladys from so benefiting by asserting fundamentally inconsistent positions. (Justice Udall, pp. 30-32; Justice McFarland, pp. 39-40) Arizona decisional law, none of which is even alluded to by the majority, is in accord with the prevailing doctrine of estoppel that prohibits a party who obtains a divorce and accepts the benefits of the decree from questioning the jurisdiction of that court in subsequent proceedings when it becomes expeditious for him or her to do so. This general rule is invoked in cases of attempted collateral attack on grounds of lack of jurisdiction over the person, *Blair* v. *Blair,* 48 Ariz. 501, 62 P.2d 1321 (1936), and lack of jurisdiction over the subject matter, *Green* v. *Green,* 77 Ariz. 219, 269 P.2d 718 (1954). In *Green, supra,* the husband had obtained a divorce from his wife in a prior Arizona proceeding. The wife had appeared by counsel and admitted the jurisdictional facts of residence. She was awarded and did in fact receive $7,000 in lieu of support and alimony. In a subsequent Arizona action, the wife sought to set aside the divorce decree and property settlement on the grounds that the parties had not been bona fide residents of the State at the time the divorce was granted, hence the Court had no jurisdiction over the subject matter of the action, i.e., the marriage. In answer to her attack, this Court replied:

> "It is contended that the court had no jurisdiction over the subject matter of the divorce action and it is therefore void. Clearly, under this finding, the court in fact had no jurisdiction over the subject matter of the action and as to an innocent party it would no doubt be set aside. *Under certain circumstances, however, the parties may be estopped to question the validity of a judgment for lack of jurisdiction. As applied to a divorce decree, the general*

> *rule is that if one's conduct has led to the obtaining of the decree, or if his conduct for any other reason has been such as would make it inequitable to allow him to deny the validity of the decree, the courts will not listen to his pleas of invalidity.* Restatement of the Law, 1948 Supplement, Conflict of Laws, Sec. 112, Comment (c).
>
> *"Under such circumstances, equity closes the door and refuses to disturb the situation thus created."* 77 Ariz. at 221-22, 269 P.2d at 719-20. (Emphasis added.)

The Court then held that she was estopped from alleging invalidity of the decree since she had participated and assisted in causing the divorce to be granted, had received the benefit of the property settlement and had helped to create a situation that resulted in the remarriage of her former husband.

The doctrine expounded in *Green* most certainly should apply in a case such as this, where Gladys obtained the divorce *she* sought and accepted a division of the community property after she led the Idaho court to believe that her interest in the hotel property was a community one. Her conduct in the Idaho action was such as to cause the husband, Arnold, in reliance upon her admission that the property was community property, to forego argument to the trial court that a different form of property settlement than that which resulted was necessary because of her allegation (if she had made it) that the hotel property was her separate property. In other words, if the husband in the divorce action had thought there was any chance that that Court would have held that the hotel property could not be awarded the husband (holding it to be Gladys' separate property), he would have undoubtedly argued for a division more favorable to him than the one he now ends up with. Gladys now seeks to retain the benefits of the division but not the burdens, when the situation is of her making. A case similar on its facts to the one at hand is *Weesner* v. *Weesner,* 168 Neb. 346, 95 N.W.2d 682 (1959), where the court held that estoppel prevented a collateral attack for want of jurisdiction over out-of-state property involved in the divorce

decree property settlement. See also *Brandt* v. *Brandt,* 76 Ariz. 154, 261 P.2d 978 (1953); 24 Am.Jur., Divorce and Separation, Sec. 946; 27B C.J.S., Divorce, Sec. 363.

In *Unruh* v. *Industrial Commission,* 81 Ariz. 118, 301 P.2d 1029 (1956) (Struckmeyer, J.), this Court recognized still another form of estoppel, i.e., "quasi estoppel", which prevents a spouse who obtained a divorce from a court which had no jurisdiction from questioning the validity of that divorce for her own personal financial advantage. The Court did not require that the other party rely upon the estopped spouse's earlier conduct, but stated that principles analogous to estoppel prevent "the assertion of rights inconsistent with a litigants past conduct." 81 Ariz. at 120, 301 P.2d at 1031. The application of the doctrines of the *Green* and *Unruh* cases to the facts at hand cannot be avoided.

The majority contends, however, that Gladys could not by consent confer jurisdiction over the subject matter upon the Idaho court. But this admittedly generally recognized rule is not applicable where the court estops a litigant from denying the significance of her earlier conduct. For, as this Court said in *Green, supra,* where it held one spouse estopped to question the jurisdiction of the court over the subject matter:

> "This is not the equivalent of allowing parties to confer jurisdiction by consent; it is merely saying the court refuses to grant relief to a guilty party." 77 Ariz. at 222, 269 P.2d at 720.

See also *Application of Martin,* 76 Idaho 179, 184, 279 P.2d 873, 876 (1955); wherein that court recognizes the effect of estoppel from arguing lack of jurisdiction over the subject matter.

This doctrine of estoppel applies with special force and effect in a case such as this where the judgment sought to be attacked is a sister-State judgment. In these circumstances the Full Faith and Credit Clause of the U.S. Constitution requires, and indeed compels, the courts of one State to give special deference to the judgments of another State, which judgments are regular on their face.

Since Gladys is estopped by her earlier conduct from asserting lack of the Idaho court's jurisdiction over the Arizona Hotel property, several of the arguments relied upon by the majority must fall. All of the following grounds for denying full faith and credit to that decree depend upon Gladys' being able in the instant action to set up the facts of the sheriff's sale in asserting invalidity of the Idaho disposition of the hotel property:

1. The Idaho decree is not entitled to recognition because it denied enforcement of earlier Arizona adjudication that Gladys owned as separate property all of Arnold's intrest in the hotel property. (pp. 5-6)

2. Full faith and credit can be denied because the divorce court had no power to distribute Gladys' separate property. (pp. 6-7)

3. The Idaho decree will not be given greater effect than earlier Arizona adjudication that Gladys owned as separate property the couple's former interest in the hotel. (pp. 7-8)

4. The Idaho court was without jurisdiction to entertain Appellant Porters' intervention action since that court had no power to distribute Gladys' separate property. (pp. 8-9)

5. The Idaho court could not directly affect title to Gladys' separate property that was located in Arizona. (pp. 10-12)

As can be seen from the above mentioned grounds of the majority opinion, since Gladys is estopped from claiming in this action that the Idaho court dealt with her separate property, each and every one of those grounds must be held to be foreclosed to her in this collateral attack.

Thus, as a matter of purely local Arizona law, and without reaching the otherwise dispositive full faith and credit argument, this Court can and should recast its opinion so as to preclude Gladys from attacking the Idaho decree, or any part thereof, on the above cited grounds.

ARGUMENT II

THE IDAHO JUDGMENT IS ENTITLED TO FULL FAITH AND CREDIT AND IS RES JUDICATA AS TO EACH AND EVERY GROUND, JURISDICTIONAL AND OTHERWISE, RELIED UPON BY THE MAJORITY.

Gladys Porter appeared personally and by counsel in the Idaho proceeding and participated therein, indeed to the extent of counterclaiming for and obtaining a divorce in her favor. Not only did she *not* contest the jurisdiction of the court over the hotel property, she herself alleged it to be community property and prayed for a division thereof. Nor did she raise any other objection going to the jurisdiction of that court to entertain either the divorce action or Appellant Porters' intervention action. The only portion of the trial court's decision that she appealed to the Idaho Supreme Court was the order enjoining her from instituting or maintaining any Arizona action against her former husband or intervenors affecting the Arizona Hotel properties. The Idaho Supreme Court ordered the trial court to amend that portion of its decree. She did not appeal the division of property or any other portion of the divorce decree. She did not seek review by the United States Supreme Court on any point.

Gladys then returned to Arizona and in the instant collateral proceeding seeks to attack the Idaho judgment as being invalid and not entitled to full faith and credit. In an opinion devoid of any mention of developed principles of res judicata and full faith and credit, a majority of this Court upheld her attack on several grounds. Those constitutional principles, discussed immediately below, necessarily require a reconsideration and reversal of this Court's opinion.

Although the Full Faith and Credit Clause of the Constitution does not prevent one State's courts from allowing a party to collaterally attack an *ex parte* sister-State judgment for lack of jurisdiction, *Williams* v. *North Carolina,* 325 U.S. 226, 65 S.Ct. 1092, 89 L.ed. 1577 (1945), the rule is quite different when such an attack is made upon the other judgment when the com-

plaining party appeared therein and participated in procuring the judgment. In the latter instance, as in the case at bar, the first judgment is entitled to full faith and credit, is res judicata as to all issues, including those of jurisdiction, and cannot be attacked collaterally where such an attack would not be allowed in the State of dendition. *Johnson* v. *Muelberger*, 340 U.S. 581, 587, 71 S.Ct. 474, 95 L.ed. 552 (1951). In *Sherrer* v. *Sherrer*, 334 U.S. 343, 68 S.Ct. 1087, 92 L.ed. 1429 (1948), which held that a foreign divorce decree could not, under these circumstances, be attacked for want of jurisdiction over the subject matter, the Supreme Court elaborated at length upon the controlling principles:

> "[T]he requirements of full faith and credit bar a defendant from collaterally attacking a divorce decree on jurisdictional grounds in the courts of a sister-State where there has been participation by the defendant in the divorce proceedings, where the defendant has been accorded full opportunity to contest the jurisdictional issues, and where the decree is not susceptible to such collateral attack in the courts of the state which rendered the decree....
>
> "If respondent failed to take advantage of the opportunities afforded him the responsibility is his own. We do not believe that the dereliction of a defendant under such circumstances should be permitted to provide a basis for subsequent attack in the courts of a sister-State on a decree valid in the state in which it was rendered." 334 U.S. at 351-52.

The subsequent case of *Coe* v. *Coe*, 334 U.S. 378, 68 S.Ct. 1094, 92 L.ed. 1451 (1948), applied the *Sherrer* rule where the defendant spouse appeared but failed to raise any objection to the jurisdiction of the court over the subject matter.

In order for the prior foreign decree to constitute res judicata, nothing more is required than that an opportunity be provided

the defendant to contest the Court's jurisdiction. It matters not that he chooses not to do so or neglects to do so. Cf. *Chicot County Drainage District* v. *Baxter,* 308 U.S. 371, 60 S.Ct. 317, 84 L.ed. 329 (1940). The foreign judgment is conclusive as to all issues that were or could have been litigated. This Court has itself specifically recognized these principles. *Day* v. *Wiswall's Estate,* 93 Ariz. 400, 381 P.2d 217 (1963). See also *Heuer* v. *Heuer,* 33 Cal.2d 268, 201 P.2d 385 (1949) (discussing the effect of *Sherrer* and *Coe*).

One of the primary arguments of the majority opinion in this collateral attack is that the Idaho court did not have jurisdiction to directly affect Gladys' separate property in Arizona. There are two answers to this contention. First, since Gladys herself executed the deeds to the Arizona property, the Idaho court did not "directly affect" title to Arizona realty. *Kennedy* v. *Morrow,* 77 Ariz. 152, 268 P.2d 326 (1954). See *Fall* v. *Eastin,* 215 U.S. 1, 8, 11-12, 30 S.Ct. 3, 54 L.ed. 65 (1909). Secondly, the Idaho court determined for itself from the parties' pleadings that it had jurisdiction to order Gladys to convey her interest in the property and it is now settled that the adjudication of facts affecting title to land located in another State becomes res judicata and is entitled to full faith and credit in the State in which the land is situated. *Durfee* v. *Duke,* 375 U.S. 106, 84 S.Ct. 242, 11 L.ed.2d 186 (1963); see Hancock, *Full Faith and Credit to Foreign Laws and Judgments in Real Property Litigation,* 18 Stan.L.Rev. 1299, 1319 (1966).

Relying upon recent constitutional precedent, the American Law Institute has addressed itself anew to this very problem. In Restatement of the Law (Second), Conflict of Laws (Tent. Draft No. 10) (1964), Sec. 430d, it is stated:

> "When a court has jurisdiction over the parties and determines that it has jurisdiction over the subject matter, the local law of the State where the judgment was rendered determines, subject to constitutional limitations,

> whether the parties are precluded from collaterally attacking the judgment on the ground that the court had no jurisdiction over the subject matter."

In Comment (c) to the above Section, the Institute concludes that:

> "[D]ue process does not prevent a State from impinging on the interests of a sister-State by application of rule that parties who were subject to the jurisdiction of the court cannot collaterally attack the judgment for lack of jurisdiction over the subject matter."

Having participated fully in the Idaho proceedings, but having failed to claim jurisdictional error there, one must look to Idaho law in order to ascertain whether Gladys is entitled to collaterally attack its decree on the grounds invoked by the majority opinion. In *Treece* v. *Treece,* 84 Idaho 457, 373 P.2d 750 (1962), that court stated that a divorce decree regular upon its face could not be attacked collaterally by a party except on the ground of extrinsic fraud. Said judgments are held to be conclusive as between the parties on all issues determined or which should have been determined thereby. See also *Robinson* v. *Robinson,* 70 Idaho 122, 212 P.2d 1031 (1949). Having pleaded that the hotel property was community property, thereby giving that court jurisdiction to divide it, the judgment is regular upon its face. Neither Gladys nor the majority opinion suggest that the proceedings there were had as a result of fraud. Thus, since Gladys could not collaterally attack the decree in Idaho, she cannot do so in Arizona.

Therefore, the Idaho divorce decree is res judicata in this Arizona action on the questions of whether the hotel property is or was community property or her separate property and as to the validity of the trial court's order compelling her to convey her interest therein to the partners. This being so, the majority opinion errs in concluding that the Idaho court was without jurisdiction to award the hotel property to Arnold and the sisters, that the Idaho court did not have jurisdiction to entertain the inter-

vention action, that Gladys could not consent to the Idaho court's assuming jurisdiction over her separate property and that the out-of-state court had no jurisdiction to determine title to the Arizona land. The decree being valid, the deeds, assignments and releases executed pursuant thereto are valid also.

The other grounds of the majority opinion are equally without merit. All three reasons are rendered untenable by the same general principal of res judicata as embodied in the Full Faith and Credit Clause. The majority maintain, on the one hand, that the Idaho decree is not entitled to full faith and credit simply because it refused to recognize and give effect to the earlier Arizona adjudication. (pp. 5-6) It is not entirely clear what prior Arizona judgment the majority have in mind. Gladys, in her Idaho Counterclaim (Supp. A.R. 23-37), made reference to only one Arizona decree, the original judgment for separate maintenance of May 14, 1959. She did request that the Idaho court enforce that judgment. She did *not,* however, set up the July 21, 1959, Arizona judgment which determined the arrearages due under the original separate maintenance decree. Nor did she inform the Idaho court of the subsequent Arizona sheriff's sale. Justice Udall, at pp. 15-24 of his dissenting opinion, convincingly argues that *none* of these prior Arizona proceedings constituted a final judgment on the question of ownership of the hotel property and that the Arizona sheriff's sale is not a judgment in any event, hence Idaho was not in fact or in law required to defer to prior Arizona judication. We cannot improve upon the logic and force of Justice Udall's argument on these points and therefore incorporate it herein by reference. In any event, if Gladys had desired recognition of these latter two "judgments" (assuming, *arquendo,* that the sheriff's sale constituted a "judicial proceeding" as required by the Full Faith and Credit Clause) she was obliged to set them before that court and request their recognition and enforcement. See *Roche* v. *McDonald,* 275 U.S. 449, 445, 48 S.Ct. 143, 72 L.ed. 365 (1928); *Garden Suburbs Golf & Country Club* v. *Murrell,* 180 F.2d 435, 436 (5th Cir.), *cert. denied,* 340 U.S. 822 (1950);

Lewis v. *Lewis,* 49 Cal.2d 389, 393, 317 P.2d 987, 990 (1957).

As for the original Arizona separate maintenance decree that she did set up, it is arguable that Idaho should have recognized and enforced the husband's obligations thereunder as to the payments that were then accrued, vested, and unmodifiable, and charged Arnold's interest in the hotel property in that amount. It is not entirely clear, however, that even accrued installments owing under a pre-existing separate maintenance decree survive a valid foreign divorce where both spouses appear generally. Compare *Gilbert* v. *Gilbert,* 83 Ohio St. 265, 94 N.E. 421 (1911) with *Bloedorn* v. *Bloedorn,* 76 F.2d 812 (D.C. Cir. 1935), *cert. denied,* 295 U.S. 746 and *Jackson* v. *Jackson,* 200 A.2d 380 (D.C. Ct.App. 1964). Cf., *Sistare* v. *Sistare,* 218 U.S. 1, 30 S.Ct. 682, 54 L.ed. 905 (1910); *Estin* v. *Estin,* 334 U.S. 541, 68 S.Ct. 1213, 92 L.ed. 1561 (1948); *Lynn* v. *Lynn,* 302 N.Y. 193, 97 N.E.2d 748 (1951), *cert. denied,* 342 U.S. 849.

However, it is not important to resolve this matter, for even if the Idaho court erred in refusing to enforce the accrued installments, and even if Gladys had indeed placed the facts of the Arizona sheriff's sale before that court and the latter had erroneously refused to give such "proceedings" effect, the Idaho decree is nonetheless entitled to full faith and credit. Retaliation by the courts of Arizona is fudamentally inconsistent with notions of full faith and credit.

The United States Supreme Court has passed on just such a question on several occasions. The leading case is *Treinies* v. *Sunshine Mining Co.,* 308 U.S. 66, 60 S.Ct. 44, 84 L.ed. 85 (1939). In *Treinies,* the Idaho court with both parties before it, conferred title to certain personal property upon A, after first finding that a prior Washington judgment between the parties which awarded the property to B was not entitled to full faith and credit because of a jurisdictional defect. In a third action between A and B, B attempted to rely upon the original Washington decree. The United States Supreme Court held that B was not entitled to rely on the Washington judgment

> "because of the Idaho decision that the Washington probate court did not have exclusive jurisdiction. This is true even though the question of the Washington jurisdiction had been actually litigated and decided in favor of [B] in the Washington proceedings. *If decided erroneously in the Idaho proceedings, the right to review that error was in those (the Idaho) proceedings* . . . .
>
> "The power of the Idaho court to examine into the jurisdiction of the Washington court is beyond question. *Even where the decision against the validity of the original judgment is erroneous, it is a valid exercise of judicial power by the second court.*
>
> "One trial of an issue is enough. 'The principles of *res judicata* apply to questions of jurisdiction as well as to other issues', as well to jurisdiction of the subject matter as of the parties." 308 U.S. at 76-78 (citations and footnotes omitted and emphasis added.)

Treinies is on all fours with the instant case and should control its disposition. Justice Udall acknowledged this in his dissent (p. 26), and the unanimous Court of Appeals below recognized that it was bound by the *Treinies* principle. *Porter* v. *Porter,* 1 Ariz. App. 363, 403 P.2d 298 (1965). Subsequent Supreme Court decisions have adhered to the *Treinies* doctrine. See, e.g., *Morris* v. *Jones,* 329 U.S. 545, 552, 67 S.Ct. 451, 91 L.ed. 488 (1947); *Sutton* v. *Leib,* 342 U.S. 402, 408, 72 S.Ct. 398, 96 L.ed. 448 (1952) and *Milliken* v. *Meyer,* 311 U.S. 457, 462, 61 S.Ct. 339, 85 L.ed. 278 (1940). In *Roche* v. *McDonald,* 275 U.S. 449, 48 S.Ct. 143, 72 L.ed. 365 (1928), a decision predating *Treinies,* the Court stated:

> "If McDonald desired to rely upon the Washington statute as a protection from any judgment [in Oregon] . . . he should have set up that statute in the court of Oregon and submitted to that court the question of its construction and effect. And even if this had been done, he could

> not thereafter have impeached the validity of the judgment because of a misapprehension of the Washington law. In short, the Oregon judgment, being valid and conclusive between the parties in that state, was equally conclusive in the court of Washington, and under the full faith and credit clause should have been enforced by them." 275 U.S. at 455.

The three cases relied upon by the majority of this Court to support their retaliatory move do not stand for any such proposition. *Reynolds* v. *Stockton,* 140 U.S. 254, 11 S.Ct. 773, 35 L.ed. 464 (1891) and *Hanna* v. *Stedman,* 230 N,Y. 326, 130 N.E. 566 (1921) do not even discuss, let alone invoke, any such principle. The early lower court decision from New Jersey, *Dixon* v. *Dixon,* 76 N.J. Eq. 364, 74 Atl. 995 (1909) is distinguishable since the complaining party did not appear in the second proceeding and it was therefore not res judicata as to him. In any event, time and controlling precedent have passed Dixon by. Modern-day federal and State court decisions recognize that the State whose earlier judgment was denied full faith and credit by a sister-State court cannot for that reason refuse to recognize and enforce as res judicata the out-of-State decree. E.g., *Southard* v. *Southard,* 305 F.2d 730 (2nd Cir. 1962) noted in 65 W.Va. L.Rev. 220 (1963); *Lynn* v. *Lynn,* 302 N.Y. 193, 97 N.E.2d 748 (1951), *cert. denied,* 342 U.S. 849; *Johnson* v. *Johnson,* 199 Md. 329, 86 A.2d 520 (1952); *Lewis* v. *Lewis,* 49 Cal.2d 389, 317 P.2d 987 (1957); *Shipp* v. *Shipp,* 383 P.2d 30 (Okla. 1963). See *State* v. *American Can Co.,* 42 N.J. 32, 198 A.2d 753 (1964). In *Lewis* v. *Lewis, supra,* the husband had obtained an *ex parte* divorce in Nevada but failed to set it up as a defense to an Illinois divorce action brought by the wife. Having obtained her Illinois divorce, she next sued the husband in California for accrued support payments. The husband then claimed that the Illinois decree was void for want of jurisdiction over the marriage because of the earlier Nevada decree. A unanimous California Supreme Court, per Traynor, J., stated:

> "The first answer to this contention is that it should have been invoked in the Illinois proceeding and that even if the Nevada decree had been pleaded as a defense in that proceeding and the Illinois court had erroneously failed to recognize it, defendant's remedy was by appeal and he cannot now attack the Illinois judgment. [citing *Treinies, supra*]." 49 Cal.2d at 393, 317 P.2d at 990.

Next, the majority states that the "full faith and credit clause does not compel us to overrule our decision by recognizing the Idaho judgment were we to concede its validity." (p. 7) Such a statement completely ignores the simple operation and effect of res judicata. For if the validity of the Idaho decree were to be conceded, then it becomes res judicata as between the parties thereto as regards all the issues determined and all the issues that could have been determined therein. The Restatement of the Law, Judgments, Sec. 42, describes the effect of the second judgment on a prior inconsistent judgment:

> "Where in two successive actions between the same parties inconsistent judgments are rendered, the judgment in the second action is controlling in a third action between the parties."

Subsection (e) of Sec. 42 provides:

> "The rule stated in this Section is applicable not only where the actions are brought in the same State, but also where they are brought in different States."

(See Justice Udall's dissent, pp. 25-27.)

The Restatement of the Law (Second), Conflict of Laws (Tent. Draft No. 10, 1964), provides:

> "Sec. 439a. *Inconsistent judgments.* A judgment will not be recognized or enforced in other States if an inconsistent, but valid judgment is subsequently rendered in another action between the parties and if the earlier judgment is superseded by the later judgment under the local law of the State where the later judgment is rendered."

Comment (a) to the above Section states that the rule is applicable even though the court that rendered the later judgment denied full faith and credit to the first judgment or made other errors of fact or law. Comment (e) notes that the rule is one of constitutional law as between the States. The State cases cited by the majority for the proposition that the subsequent, valid out-of-state judgment does not supersede the prior Arizona determination on the same issue (*Colby* v. *Colby,* 78 Nev. 150, 369 P.2d 1019 (1962), *cert. denied,* 371 U.S. 888; *Perry* v. *Perry,* 51 Wash.2d 538, 318 P.2d 968 (1958) and *Hammell* v. *Britton,* 19 Cal.2d 72, 119 P.2d 333 (1941) have been uniformly and roundly criticized as being inconsistent with principles of res judicata embodied in the Full Faith and Credit Clause. See, e.g., Note, 31 Geo. Wash.L.Rev. 648 (1963); Note, 15 Stan.L.Rev. 331 (1963); Note, 16 Vand.L.Rev. 193 (1962). The California decision in that group, *Hammell* v. *Britton, supra,* should be viewed in light of the more recent opinion of that court discussed above, *Lewis* v. *Lewis, supra,* where the *Treinies* rule is invoked in a similar situation.

Finally, objections that the Idaho court had no jurisdiction to entertain the intervention action (majority opinion, pp. 8-9, 12), either because the Idaho rules of procedure did not permit the intervention action or because the partnership itself was not a party before the Court, are unavailable to Gladys for the same reason. Having participated in the action, the principles and authorities discussed above require that Gladys has presented her objections in that proceeding at that time. Having failed to do so, the judgment is res judicata on all questions of law, including jurisdiction to entertain Appellant Porters' intervention action. *Milliken* v. *Meyer,* 311 U.S. 457, 462, 61 S.Ct. 339, 85 L.ed. 278 (1940).

CONCLUSION

For the reasons stated and discussed above, the Court should order the vacating of its original decision in this matter, the reinstatement of the unanimous Court of Appeals decision and the reversal of the trial court judgment below. Because the present majority opinion is so plainly at odds with settled Arizona law regarding estoppel and directly contradicts controlling principles of res judicata and full faith and credit, this Court should not and cannot allow such a result to stand.

Respectfully submitted,
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15. PETITIONERS PORTER AND LEONARD'S MOTION FOR REHEARING IN THE ARIZONA SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF ARIZONA

PEARLINE PORTER, PAULINE P. LEONARD and GEORGE C. KEMBLE, Appellants, vs. GLADYS E. PORTER, Appellee.	NO. 7594 PR MOTION FOR REHEARING

COME NOW the appellants, Pearline Porter and Pauline P. Leonard, and move the Court for a rehearing in the above entitled matter for the following reasons:

The majority opinion rendered in this case is based upon what we believe to be statements of law which, if left unexplained or uncorrected, constitute dangerous precedent for the guidance of lower courts and the Supreme Courts of the future. We cannot believe that the membership of this Court would summarily dismiss our criticism, which is respectfully offered by way of this motion. A calm reconsideration of some of the language and statements of this decision seeking to justify the end conclusion, we sincerely believe will give the membership of this Court at least pause for thought. It is no news to the membership of this Court that either way the decision of this Court eventually finalizes, one of the parties will undoubtedly seek the interpretation of the United States Constitutional questions by the Supreme Court of the United States. We feel sure that the Court would wish to present its decision in the best language possible.

I.

WAS THERE A VALID, PRIOR ARIZONA JUDGMENT ENTITLED TO FULL FAITH AND CREDIT?

The majority decision bases its prime reasoning on the existence of a prior Arizona judgment, which prevented any Idaho consideration of the ownership of the Arizona Hotel property. The Arizona separate maintenance decree was not entitled to full faith and credit and did not adjudicate any property rights between any of the parties for the following reasons, not discussed by the majority opinion.

A. The effect of the majority decision is to now allow a separate maintenance decree to impose a lien on the community property of the parties, in absolute contravention of A.R.S. 25-342B, which states:

> The final judgment may provide for payment by the husband to the wife in one sum, or from time to time, amounts necessary for support of the wife and minor children. The amount may be adjudged a lien upon the *separate* property of the husband. (Emphasis added.)

If this statute is correct as it reads, a separate maintenance action cannot in any manner affect the community property of the parties, and therefore, a decree imposing a lien on the community property is void for lack of jurisdiction, for the same reason that the majority claims the Idaho decree was invalid for attempting to dispose of Gladys' separate property in a divorce action. Thus, the Arizona decree being void for lack of jurisdiction, the Idaho court was not required to give it full faith and credit, and the ownership of the Arizona Hotel was properly submitted in the Idaho action.

B. The Arizona decree, by its own language, made no adjudication of the property rights in the Arizona Hotel as between Gladys and Arnold. A reading of the decree immediately shows that the court in no manner decreed that the community owned any interest of any kind in the Arizona Hotel. This is most

succinctly pointed out in Justice Johnson's dissent in *Porter vs. Stanford,* 86 Ariz. 402, 347 P.2d 35. The only portion of the Arizona decree which touched on the question of the Arizona Hotel was the imposition of a lien on "any community interest" in the Arizona Hotel. This certainly was no adjudication of the property rights of the Porters in the Hotel property. Thus, the question was left open for the Idaho court to determine what, if any, community interest the parties might have in either the Arizona Hotel or in the Continental Hotels partnership for the purpose of computing and dividing community property between the parties.

C. The Arizona judgment and decree did not have the finality necessary to entitle it to full faith and credit. The ownership of the Hotel property was an open and contingent matter yet to be determined in the Arizona separate maintenance action. This point regarding finality is thoroughly analyzed with an abundance of authorities in Justice Udall's dissent and in Justice Johnson's dissent in *Porter vs. Stanford,* supra.

D. The Arizona decree is further defective and not entitled to full faith and credit for the reason that it was an in rem judgment based on a void attachment of Arizona real estate. The majority opinion completely overlooks and disregards the nature of the jurisdiction of the Arizona court in granting the decree of separate maintenance. The judgment of Gladys Porter was rendered on substituted service and attachment of the Arizona Hotel realty. Therefore, that portion of the judgment which provided for support payments and subsequent judgment for arrearage was one in rem, limited to any direct interest that Arnold Porter had in the Hotel. *Porter vs. Duke,* 34 Ariz. 217, 270 Pac. 625. *Brown vs. First National Bank of Winslow,* 59 Ariz. 392, 129 P.2d 664.

In proceeding against a non-resident, or bringing a party within the jurisdiction of the Court as the basis for proceeding in rem, validity of the judgment depends upon the validity of the attachment, and where the attachment was defective or did not reach

any property belonging to defendant, the judgment is void. *Glenn vs. Ferrell,* 304 P.2d 380, 5 Utah 2d 439. (While there are numerous decisions in support of this proposition, this case is most directly in point.) It follows, therefore, (and the majority decision does not take this into account) that Gladys' judgment was open to collateral attack if any other court, including that of Idaho, found that the attachment reached no assets of Arnold. The very decision now under review stands for the proposition that a court may question the jurisdiction of a prior judgment by determining whether it had jurisdiction to enter same. How can it be said, then, that the nature of Arnold's interest in the Hotel was none of the Idaho court's business, when it was the basis for the prior Arizona judgment?

Whether or not Gladys' judgment was valid or void, depends solely upon whether the parties' interest in the Hotel was community or partnership. The Idaho court could and did inquire into this aspect and found that the property in question belonged to a partnership. Once having so found, it considered A.R.S. 28-255B (3), which specifically prohibits the levying of an attachment on a partner's interest for personal obligations of the partner.

It is established law, and again the decision completely ignores it, that a partner has no direct interest in the firm assets. Partnership property belongs to the firm, not to the partners, each of whom is entitled to share what remains after payment of partnership debts and settlement of accounts between partners. *Krone vs. Higgins,* 158 P.2d 471, 195 Okla. 380. *Claude vs. Claude,* 228 P.2d 776, 191 Ore. 308. *Clarke vs. Fiedler,* 113 P.2d 275, 44 C.A.2d 838. *C.I.R. vs. Lehman,* 165 F.2d 383, & A.L.R.2d 667, Cert. Denied 68 S.Ct. 1085, 334 U.S. 819, 92 L.Ed. 1749. This right may be held as community, but its value, or indeed liability, cannot be determined without prior accounting.

The majority cite *Spector vs. Spector,* 94 Ariz. 175 382 P.2d 659, as authority for the proposition that a wife may have a lien

attached to the husband's share of community owned partnership property. This is not the law, and this case is no authority for that statement. An analysis of the *Spector* case will quickly show that it was a divorce case, not a separate maintenance action, and the lien which was imposed therein was imposed in the final divorce decree after the community property had been awarded to the husband, making it his separate property. This case is only authority for the proposition that a lien for the payment of alimony subsequent to a divorce may attach to separate property of the husband, which he acquired after division of the community property under the divorce decree.

The majority further cites *Coe vs. Winchester,* 43 Ariz. 500, 33 P.2d 286, for its statement that partnership assets acquired during coverture are community property and belong to both spouses. This may have been the law in 1934 when this case was decided, but certainly is not the law today under the terms and provisions of the Uniform Partnership Act, which was not adopted in Arizona until long after 1934. This is exactly one of the aspects of partnership law which the Uniform Partnership Act sought to change.

The majority opinion is therefore in error when it assumes the prior Arizona judgment to be valid under all circumstances and that the Idaho court had to give it full faith and credit without questioning its jurisdictional prerequisites. The Idaho court was the first forum in which this question was litigated, and having found that the Arizona Hotel was partnership property, could and did refuse it recognition; that is, unless this Court, by its decision, wishes to hold that the provisions of the Uniform Partnership Act are of no effect, or that a valid in personam or in rem judgment may be obtained against a partner on substituted service where the plaintiff attached a specific asset of a partnership in which the defendant is a partner. To so hold is to wreak havoc with the law and rights of partnerships.

In summary, the Idaho court in the divorce action was fully competent to inquire into the location, nature, amount, type and

ownership of all community assets of the parties, in order that it could properly compute and divide community assets between the parties. Pursuant to this authority, it properly inquired as to the status of the Arizona Hotel property and the separate maintenance decree rendered by the Arizona court. For if, under the Uniform Partnership Act, the Arizona Hotel were partnership property, then the wife bought nothing at the Sheriff's sale or under her Arizona decree, and the Idaho court was faced with the disposition of a 2/3 partnership interest and in computing the worth of this interest must decide what assets and what value the partnership had. The Idaho court, rather than exceeding its jurisdiction, would have been derelict in its duty not to have made full inquiry, findings, determinations and computations of all of the community assets wherever located in the full determination of the divorce action before it.

II.

THE IDAHO DECISION DID NOT DIRECTLY TRY THE TITLE OF THE ARIZONA PROPERTY

The statement of the majority that the action of the Idaho court was by way of a quiet title action to Arizona property we must respectfully submit is completely without basis on the record before the Court, both in law and fact. The members of partnership were all before the Idaho court pursuant to the order of intervention. They all asked for a determination of what the partnership owned and what the community owned. Gladys, who was one of the holders of title to the realty, could have no greater title insofar as the partnership was concerned than her husband had, particularly in view of the fact that the court found (and we must presume from competent evidence) that the properties were purchased, operated, repaired, improved and maintained with partnership funds, and that the partnership operated other hotel establishments in conjunction therewith. This is not trying title to Arizona real estate. This is merely imposing a trust upon certain partners for the benefit of the partnership,

which partners used partnership funds to purchase the property in question. Even the Idaho Supreme Court in *Porter vs. Porter*, 373 P.2d 327, said:

> Appellant in arguing this case advances the theory that the trial court tried the title to the Arizona property. We do not agree with such reasoning as it appears the court was computing and dividing the community debts and assets pursuant to in personam jurisdiction of the parties. (pp. 332)

III.

THE IDAHO COURT HAD A RIGHT TO CONCLUSIVELY DECIDE WHAT WAS COMMUNITY AND WHAT WAS SEPARATE PROPERTY, AND NOT BE SUBJECT TO COLLATERAL ATTACK

The majority opinion states that the Idaho court had no judicial power by consent or otherwise to take into account the Arizona Hotel because its was Gladys' separate property. It must be pointed out that if this holding is carried to its logical conclusion, no determination of any court in a divorce proceeding is free from collateral attack. Assume for the sake of argument that a party submits to the court an allegation that "X" property is community in character. The court then enters an order distributing it accordingly. Can the same party then refuse to comply with that order or collaterally attack it in another proceeding on the grounds that the property was separate all along? The decision as it now stands reaches this untenable conclusion. The chaos which the decision by this holding interjects into the law of marital relations is staggering. Every party who has been dissatisfied with the division of his or her property can now by independent action come into court and attempt to quiet title to property previously determined to be community and assert that the court was without jurisdiction to affect any of it, and be granted a new day in court.

IV.

THE SISTERS' IDAHO INTERVENTION NOT REVIEWABLE BY THE ARIZONA COURT

The majority decision in answering the Porter sisters' main argument that the Arizona judgment did not adjudicate and foreclose any of their rights flatly states that the Idaho court had no power to allow the sisters to intervene; therefore, Arizona need not give full faith and credit to its judgment.

This is an interpretation of the Idaho Rules which prescribe the methods by which parties may intervene, and is beyond the function or authority of this Court. The question could only be reviewed by a direct appeal in Idaho.

The statement, "The ownership of the Arizona Hotel was not at issue in the Idaho suit between Arnold and Gladys and that was the only issue appellants interjected into the intervention suit.", is made without reference to the recitation of the Idaho court in its judgment that it had received evidence both oral and documentary from all parties, including depositions and stipulations, and that it was fully advised in the premises. Thereafter, the court entered findings of fact and conclusions of law. We feel sure this Court does not wish to say that in all of this evidence and in the findings of fact and conclusions of law there was nothing justifying an order of intervention on the basis of a common question of law or fact as required by the Idaho rules. In this connection, it must be remembered that Gladys, in invoking the jurisdiction of the Idaho court in her counterclaim, alleged that the community had an *"interest"* in the Arizona Hotel. This indicated that she did not claim complete ownership, but sought an accounting and disclosure of all community property, asking not less than one-half of it. This Court is referred to the partnership agreement in evidence. This agreement was executed prior to acquisition of the Arizona Hotel. It was signed by Gladys and declared as its purpose the operation of a hotel system. The record of this case and the other cases in Arizona and Idaho in-

dicates that this partnership agreement was received in evidence by the Idaho court. The petition for intervention is not part of the record before this Court, but the order of intervention is contained in Exhibit D. This order recites that before the order was made, the court was fully advised in the premises, counsel for all parties appearing. In the face of this recitation, we feel sure that this Court cannot and will not presume that the Idaho court had no adequate evidence of a *common question of law or fact* as to all parties, before it entered the order of intervention. To ascertain what constituted community estate as requested by Gladys, the court had to consider not only the Arizona Hotel realty, but also all monies in the possession of management, the furniture, fixtures, inventory or merchandise, bank accounts and liabilities, if any. Can there be any question that this personalty was also a partnership asset? Under the Court's own declaration as a justification for its holding of lack of jurisdiction on the part of the Idaho court, it cites the fact that Gladys acquired the Arizona Hotel under a special execution sale, and it therefore became her separate property. In this connection we point out that Gladys bought only the realty on which the Hotel was located. The execution did not reach the personalty, which, incidentally, by law she was required to first exhaust before proceeding to the sale of the realty. Right to personal property of the Hotel was never adjudicated, attached or bought in the Arizona action by anyone.

V.

IDAHO COURT'S KNOWLEDGE OF THE ARIZONA SHERIFF'S SALE

Another basis of the Court's majority opinion, upon which great reliance is placed, was the fact that two weeks after Gladys alleged in Idaho that the community had an *"interest"* in the Arizona Hotel real estate and personal properties, an execution and sale took place in Arizona, at which she bought in the real estate upon which the Hotel is situated, and if such sale was valid, the Hotel realty became her separate property and was

not a subject of consideration in the divorce proceedings in Idaho. In this connection, the Court says, "This fact *must* have been brought to the attention of the Idaho Court." (Emphasis added.) It is difficult for us to believe that the learned Judges concurring in the majority opinion would take judicial notice of such a fact because there is nothing in the record to justify such an assumption. On the contrary, the record before the Court indicates that Gladys accepted the division of the community property by the Idaho court. This division was based on an allocation of the partnership interest in the Arizona Hotel to Arnold. The decision undoubtedly would have been different had the court determined that Gladys was entitled to the entire Hotel. It is respectfully submitted that Gladys should not be permitted to reap the benefits of the Idaho decree, which took the Hotel property into consideration, and yet not be bound by its burdens.

VI.

THE PARTNERSHIP AS A PARTY IN THE IDAHO ACTION

The majority has announced that the partnership, in order to be a party to the Idaho action, had to be named in its common name. It implies that it is not sufficient for all of the partners to be before the court and to request a determination of partnership rights. The majority cites as authority for this proposition the Uniform Partnership Act as adopted in Idaho (Section 53-301, et seq.). Nowhere in the Uniform Partnership Act do we find a statutory requisite in any manner dealing with suits brought by a partnership whether by the common name or by the individual partners. The majority further cites Section 5-323 of the Idaho code, which reads as follows:

> When two or more persons associated in any business transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the asscciates;

> and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants and had been sued upon their joint liability.

By no legal reasoning can this statute authorize the conclusion that the only way a partnership can appear as a party to an action is by its common name. The statute is merely permissive in allowing the partnership to be sued without the burden of naming and serving all individual partners. In fact, the statute acknowledges that the standard manner of joining all of the individual associates is still open.

VII.

REFERENCE TO FURTHER ITEMS RAISED BY JUSTICE UDALL'S DISSENT

Justice Udall, in his clear and concise dissent, has more than adequately pointed out many of the other erroneous statements of law and reasoning in the majority decision. We adopt his dissent in its entirety by reference and make it a part of this motion for rehearing. These matters, which we have not dealt with, but most urgently call to the Court's attention, are as follows:

1. The overwhelming authority of the United States Constitution, the *Restatement* and the clear majority of cases compelling Arizona to grant full faith and credit to the Idaho judgment.

2. The effect of Gladys' submission of the issue of the Arizona Hotel as community property in the Idaho action by her answer and counterclaim.

3. The Idaho court's jurisdictional powers and rights to de-

termine the partnership question with regard to the Arizona Hotel between the parties.

Respectfully submitted,
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Attorneys for Appellants
Pearline Porter and Pauline P. Leonard

COPY of the foregoing received
July 29, 1966, by:
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16. ORDER DENYING PETITIONERS' MOTIONS FOR REHEARING IN THE ARIZONA SUPREME COURT

(October 25, 1966)

SUPREME COURT
STATE OF ARIZONA
PHOENIX
October 27, 1966

PEARLINE PORTER, PAULINE P. LEONARD and GEORGE C. KEMBLE, Trustee, Appellants, v. GLADYS E. PORTER, Appellee.	No. 7594-PR

The following action was taken by the Supreme Court of the State of Arizona on October 25, 1966, in regard to the above-entitled cause:

"ORDERED: Motions for rehearing and for oral arguments — DENIED, Justices McFarland and Udall voting to grant."

SYLVIA HAWKINSON, Clerk
By LUCILE BROOKS
Assistant Clerk

17. IDAHO RULES OF CIVIL PROCEDURE

IDAHO RULES OF CIVIL PROCEDURE, RULE 24:

"Rule 24(a). *Intervention — Intervention of right.* — Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

"(b) *Permissive Intervention* — Upon timely application anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right t ointervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . ."

18. IDAHO STATUTE ALLOWING SUITS AGAINST PARTNERSHIP ORGANIZATIONS BY NAME

IDAHO CODE, § 5-323:

"*Actions against partners.* — When two or more persons associated in any business transact such business under a common name, whether it comprises the names of such persons or not, *the associates may be sued by such common name,* the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, in the same manner as if all had been named defendants and had been sued upon their point liability." (Emphasis supplied.)

FILED
APR 7 1967
JOHN F. DAVIS, CLERK

In the

Supreme Court of the United States

OCTOBER TERM, 1966

No. 987

PEARLINE PORTER, PAULINE P. LEONARD and GEORGE C. KEMBLE, Trustee,

Petitioners,

v.

GLADYS E. PORTER,

Respondent.

MOTION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

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Respondent.

MOTION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

MOTION AND ARGUMENT

Petitioners respectfully pray that this Court rehear their petition for writ of certiorari and issue its writ to review the judgment of the Supreme Court of Arizona, entered July 14, 1966; the petition was denied by order of this Court entered March 20, 1967. Citations to opinions below, a statement of this Court's jurisdiction, and a detailed statement of the case are contained in the Petition for Writ of Certiorari.

Rehearing is requested for three reasons:

1. The Supreme Court of Arizona refused to give effect to a delivered deed of land executed pursuant to the order of an Idaho court in a divorce proceeding in which all parties in the Arizona court were participating parties (or privies) in the antecedent Idaho proceeding. The question presented in this cause, whether equitable decrees ordering the conveyance of land are entitled to full faith and credit, is of transcendent importance to the orderly judicial determination in divorce suits of private, multi-state interests in land. The adjustment of matrimonial property rights in cases in which the divorcing court has the parties before it requires that it have power to make a final, binding determination of those rights.

2. The judgment of the Supreme Court of Arizona is plainly wrong under the precedents established by this Court: Arizona's refusal to recognize the property rights Petitioners acquired by virtue of Respondent's compliance with the order of a sister-state court violates basic principles of the full faith and credit clause and of the due process clause.

3. Arizona's holding is contrary to the principles of equity power approved by this Court and contrary to the holdings of all similar cases heretofore considered by the courts of other states.

The essentials of this case may be stated simply. An Idaho court ordered Respondent, Gladys Porter (the defendant in

a divorce suit) to convey her interest in Arizona realty to Petitioners Pearline Porter and Pauline Leonard (intervenors in the divorce suit) and to Petitioner George Kemble's predecessor in title Arnold Porter (plaintiff in the suit); the court's order was made to carry into effect its division of the parties' matrimonial property rights and the rights of the intervenors in that property. Respondent executed quitclaim deeds pursuant to the decree and Petitioners filed them of record in Arizona. In a subsequent Arizona proceeding an Arizona court refused to give effect to the deeds or to give full faith and credit to the Idaho decree that underlay the deeds. The Supreme Court of Arizona affirmed. No question of local land law was involved—the question was one of federal law only. The deed complied in all respects with local Arizona law respecting conveyances and no question of the deed's validity has been presented on grounds other than the effect in Arizona of a deed executed in compliance with the order of a foreign court.

Since Chief Justice Marshall's opinion in *Massie v. Watts*, 6 Cranch (U.S.) 148 (1810), an unbroken line of authority has acknowledged the proposition that a court of equity with personal jurisdiction of a defendant has power to compel him to convey land by its decree. In *Fall v. Eastin*, 215 U.S. 1, 5 (1910), this Court said:

> The territorial limitations of the jurisdiction of courts of a state over property in another state has a limited exception in the jurisdiction of a court of equity, but it is an exception well defined. A court of equity, having authority to act upon the person may indirectly act upon real estate in another state, through the instru-

> mentality of this authority over the person. Whatever it may do through the party, it may do to give effect to its decree respecting property whether it goes to the entire disposition of it or only to affect it with liens or burdens. Story, Confl. L. §544. In French v. Hay (French v. Stewart), 22 Wall. 250-52, 22 L. Ed. 857, 858, this court said that a court of equity, having jurisdiction *in personam*, has power to require a defendant "to do or to refrain from doing anything beyond the limits of its territorial jurisdiction which it might have required to be done or omitted within the limits of such territory.

Because of this principle of power, the Late Brainerd Currie was able to say that "[w]ithout exception, the courts recognize the validity of a deed executed under the compulsion of a foreign decree." Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. Chi. L. Rev. 620, 629 (1954); see, *e.g.*, *Phillips v. Phillips*, 224 Ark. 225, 272 S.W. 2d 433 (1954); *cf. Farley v. Farley*, 227 Cal. App. 2d 1, 38 Cal. Rep. 357 (1964), cert. denied 379 U.S. 945; *Rozan v. Rozan*, 129 N.W. 2d 694 (N.D. 1964) Because of the decision by the Supreme Court of Arizona in this anomalous case, Professor Currie's conclusion is no longer accurate.

The deeds under which Petitioners claim an interest in Arizona real property were executed by a defendant who appeared in an Idaho divorce proceeding and litigated the issue. No third party rights were involved in the Arizona proceeding. Refusal to accept the deeds is patently violative of the command of the full faith and credit clause of the Constitution and the principles of *res judicata* recognized by this Court as an integrant of that clause. This Court has recognized as a general rule "that a judgment is

entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment." *Durfee v. Duke*, 375 U.S. 106, 111 (1963). Professor Hancock stated the obvious extrapolation:

> The conclusion seems inescapable that if the defendant has executed a conveyance in obedience to such a decree, the courts of the situs [of land] may not constitutionally hold that the execution was an effectual act because the foreign court had no jurisdiction to compel its performance. * * * Can it be seriously contended that, although the court of equity had jurisdiction to compel the defendant to convey the property, it had no jurisdiction to decide the issues of fact on whose adjudication its decree necessarily rested or to impose any enforceable obligation on the defendant, so that if he should elude the officers of the court, all goes for naught? [Hancock, *Full Faith and Credit to Foreign Laws and Judgments in Real Property Litigation: The Supreme Court and the Land Taboo*, 18 Stan. L. Rev. 1298, 1318-19 (1966) (reprinted in Appendix for convenience of the Court).]

Given personal jurisdiction of the parties and litigation of an issue, the full faith and credit clause requires that a state give effect to findings of facts, including jurisdictional facts, made by sister-state courts in rendering their judgments. *Durfee v. Duke, supra; Treinies v. Sunshine Mining Co.*, 308 U.S. 66 (1939); *Stoll v. Gottlieb*, 305 U.S. 165 (1938); *Baldwin v. Iowa Traveling Men's Ass'n*, 283 U.S. 522 (1931).

Reasons for this rule are apparent. Litigation must end at some point, and a rule that does not accord finality to

a judgment based on full and fair litigation of issues would be intolerable. When the judgment has been executed, as here, finality is needed even more. If the Idaho judgment had awarded money damages to the plaintiff, would the Arizona court be permitted to entertain an action for the return of moneys paid in satisfaction of the judgment? The question would obviously be rhetorical but for the fact that the Arizona court has done this when it refuses to recognize deeds executed in fulfilment of the order of an Idaho court of equity. Surely due process of law must limit the power of a court to refuse recognition of property rights created by act of a court of competent jurisdiction.

The need for this Court's attention is apparent. Per *Sherrer v. Sherrer*, 334 U.S. 343 (1948), and other decisions of this Court, a decree of divorce is entitled to full faith and credit without regard to the issue of the divorce court's jurisdiction to entertain the suit—its determination of domicile, the basis of divorce jurisdiction, is not collaterally assailable in a sister state. Divorce actions may be instituted only at the domicile of one of the spouses, and it is essential that divisions of matrimonial property be accorded full faith and credit when the parties are both before the court. To deny full faith and credit in such cases is to deny it in the cases in which it is "most imperative" and "most needed." Currie, *supra* at 627, 648.

Little reason can be found for refusing recognition of divorce decrees ordering conveyances of land, much less refusing effect to the conveyances. This Court's opinion in *Fall v. Eastin*, *supra*, is about all that can be mustered in

support of denial of full faith and credit. There is was held that full faith and credit need not be given to a commissioner's deed executed pursuant to the order of a Washington court. The parties to the subsequent litigation did not include the defendant whose contumacious refusal to comply with the order of court led to the commissioner's deed, whereas in this case the person attacking the deed is the party-grantor. Further, this Court has ruled in *Durfee v. Duke*, 375 U.S. 106 (1963), that state courts must give effect to foreign decrees even though they affect the title to land where there has been litigation of relevant questions. The Arizona Court has thus refused to follow the latest ruling of this Court on this important subject to all state courts. This Court said in *Durfee*:

> It is argued that an exception to this rule of jurisdictional finality should be made with respect to cases involving real property because of this court's emphatic expressions of the doctrine that courts of one State are completely without jurisdiction directly to affect title to land in other States. This argument is wide of the mark. Courts of one State are equally without jurisdiction to dissolve the marriages of those domiciled in other States. But the location of land, like the domicile of a party to divorce action, is a matter "to be resolved by judicial determination." Sherrer v. Sherrer, 334 U. S. at 349. The question remains whether, once the matter has been fully litigated and judicially determined, it can be retried in another State in litigation between the same parties. Upon the reason and authority of the cases we have discussed, it is clear that the answer must be in the negative. [375 U.S. at 115].

On the authority of the principles of the *Durfee* case, the Arizona judgment should be reversed by memorandum opinion.

CONCLUSION

Petitioners pray that this Court will grant their motion for rehearing of petition for writ of certiorari and upon rehearing will reverse the judgment of the Supreme Court of Arizona.

Respectfully submitted,

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I certify that this motion for Rehearing of Petition for Writ of Certiorari is not filed for purposes of delay.

EUGENE L. SMITH

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Rehearing of Petition for Writ of Certiorari have been mailed by U. S. mail, postage prepaid, to W. Francis Wilson, 324 Luhrs Building, Phoenix, Arizona and Richard A. Wilson, 401 Mayer Central Building, Phoenix, Arizona.

Eugene L. Smith

Full Faith and Credit to Foreign Laws and Judgments in Real Property Litigation: The Supreme Court and the Land Taboo

Moffatt Hancock*

"Now I'll give you something to believe [said the Queen]. I'm just one hundred and one, five months and a day."

"I can't believe *that!*" said Alice.

"Can't you?" said the Queen in a pitying tone. "Try again; draw a long breath, and shut your eyes."

Alice laughed. "There's no use trying," she said; "one can't believe impossible things."

"I daresay you haven't had much practice," said the Queen.

—Lewis Carroll, *Through the Looking Glass.*

Introduction

In resolving the problems created by the diversity of state laws in a federal nation, the Supreme Court of the United States has for more than three decades consistently adopted an analysis in terms of the governmental interests of the states concerned.[1] Over the years the Court has evolved the rule that a state court is constitutionally[2] free to apply its local law and policy to any case (or type of case) in which the forum state has a legitimate governmental interest.[3] A legitimate governmental interest requires the concurrence of a governmental policy and an appropriate relationship between the state having the policy and either the parties, the facts giving rise to the litigation, or the litigation process itself.

For example, the Texas citizenship of the insured was held to give Texas a sufficient governmental interest to enforce its law and policy avoiding contracts of life insurance where the beneficiaries lacked an insurable interest in the life of the insured. Texas was free, said the Supreme Court, to enforce a "policy which protects citizens against the assumed dangers of insurance on their

* B.A. 1933, University of Toronto; Barr. at Law 1936, Osgoode Hall; S.J.D. 1940, University of Michigan. Marion Rice Kirkwood Professor of Law, Stanford University.

1. The governmental interest analysis dates from the decision in Alaska Packers' Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532 (1935). The Court had also made use of this analysis explicitly and intuitively in earlier cases, See Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. Chi. L. Rev. 9, 12, 35–47 (1958). The author is deeply indebted to that article and to the late Professor Currie's earlier study, *Full Faith and Credit to Foreign Land Decrees*, 21 U. Chi. L. Rev. 620 (1954), for essential background information and illuminating insights.

2. *I.e.*, within the limits established by the full faith and credit clause and the due process clause of the fourteenth amendment. Since the operation of these two clauses in choice-of-law cases is almost the same (the due process clause can be involved when a foreign country has a governmental interest and the forum has none), the ensuing discussion is confined to the full faith and credit clause.

3. See Carroll v. Lanza, 349 U.S. 408 (1955).

lives held by strangers."[4] On the other hand, the Court held that Arkansas had a sufficient governmental interest to apply its own law with regard to a nonresident's liability for personal injuries suffered by another nonresident while both were temporarily present in the state of Arkansas.[5] But there is a consequential corollary to this permissive principle; where a state other than the forum has a legitimate governmental interest in the case before the court and the forum has *none*, full faith and credit must be given to the law of the other state.[6] To enforce the law of the forum under such circumstances would constitute an officious intermeddling with the concerns of another state.

In sharp contrast with these rules stands the Supreme Court's refusal to review the decision of the Supreme Court of Texas in *Toledo Soc'y for Crippled Children v. Hickok*[7] applying Texas law to a case in which Ohio had a very substantial interest and Texas had none at all. By a will executed a few months before his death a wealthy citizen of Ohio had devised valuable mineral estates to a group of charitable institutions operating only in that state. He was survived by two children also domiciled in Ohio. Ohio had a deathbed-gift law designed to protect wealthy decedents against overzealous attempts to persuade them during their last days to give their wealth to charitable institutions.[8] Under this law the devise in question would have been invalid, and the mineral estates would have gone to the testator's children. The mineral estates, however, were located in Texas, under whose law the testator would have been permitted to devise them to the charities. In short, the parties were all Ohioans; the sole ground for the application of Texas law was that the testator was attempting to devise an interest in Texas land.

It is very easy to imagine various types of cases in which the location of the land, standing alone, would have given Texas a sufficient interest to justify the application of its law, but it is impossible to identify any such interest in the *Hickok* case. For example, if the testator had directed that the land be put to some economic use prohibited by Texas law, Texas clearly would have had a legitimate interest in enforcing the prohibition for the benefit of the other members of the Texas community. Texas would also have had a sufficient interest if the testator had tried to create remote future interests in Texas land contrary to the Texas version of the Rule Against Perpetuities; such remote interests might have prevented the sale of the land, to the detriment of the entire Texas com-

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4. Griffin v. McCoach, 313 U.S. 498, 507 (1941). "Likewise it is for Texas to say whether its public policy permits a beneficiary of an insurance policy on the *life of a Texas citizen* to recover where no insurable interest exists in the beneficiary." *Id.* at 503. (Emphasis added.)

5. Carroll v. Lanza, 349 U.S. 408 (1955).

6. See John Hancock Mut. Life Ins. Co. v. Yates, 299 U.S. 178 (1936); Home Ins. Co. v. Dick, 281 U.S. 397 (1930); New York Life Ins. Co. v. Head, 234 U.S. 149 (1914). For a discussion of these cases see Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 38–39, 43–44, 46–47 (1958).

7. 152 Tex. 578, 261 S.W.2d 692 (1953), *cert. denied*, 347 U.S. 936 (1954). For a detailed analysis of this case see Hancock, *"In the Parish of St. Mary le Bow, in the Ward of Cheap,"* 16 STAN. L. REV. 561–74 (1964).

8. "Such restrictions are based on grounds of public policy. They are to protect testators against themselves in their last moments, as well as against designing persons." Folsom v. Haas, 9 Ohio C.C.R. 473, 483 (1895). Regarding deathbed-gift laws and other restrictions on testamentary gifts to charities see Joslin, *Legal Restrictions on Gifts to Charities*, 21 TENN. L. REV. 761 (1951).

munity. If the testator had devised Texas land to a charitable institution operating in Texas for the benefit of Texans, this circumstance also would have given Texas a legitimate interest in seeing that the charity got the land.

In each of these hypothetical examples the policy of the Texas law would have been directed to the actual use of the land or to the free circulation of the land in the market; hence Texas would have had an interest in the enforcement of its law. But the Texas law involved in the *Hickok* case was not a law of this type. While the Ohio law was designed to protect wealthy Ohio decedents from being imposed upon, the Texas law was designed to give Texas decedents a larger measure of freedom to dispose of their property by will. Texas, therefore, had no interest in the gift of an Ohioan to Ohio charities, but Ohio had a rather substantial interest in throwing the protective arm of its statute around its dying citizen.

Why, then, did the Supreme Court of Texas insist on applying Texas law to a case in which Texas had no legitimate governmental interest? A passage in the opinion strongly suggests a belief that a Texas court disposing of Texas real property ought to uphold the Texas policy of carrying out the testator's intentions regardless of the policy of his domicile.[9] One wonders what the Texas judges would have expected an Ohio court to do in the converse case of a wealthy Texan devising a valuable estate in Ohio lands to Texas charitable institutions. In such a case the teaching of the *Hickok* opinion would require the Ohio court to assist the Texas testator's children (even though domiciled in Texas) in breaking their father's will and enriching themselves at the expense of the Texas charities. This absurd result, though clearly required by the principle of the *Hickok* case that the domestic policy of the forum-situs must be enforced in *every* case involving title to local land, would likewise be inconsistent with the constitutional rules laid down by the Supreme Court.

Is there any plausible way to reconcile the denial of certiorari in the *Hickok* case with the rules evolved by the Supreme Court? A commentator who was extremely anxious to effect such a reconciliation might argue that one of the policies of the Texas law conferring greater testamentary freedom is to encourage nonresidents to invest their money in Texas land by bestowing this freedom upon them.[10] Thus he would say that Texas had an interest in the application of this

9. Shortly before his death the testator had entered into a written contract by which his mineral estates were to be transferred to corporations in exchange for stock in the corporations. His will directed his executors to carry out this contract, which had not been performed at the time of his death. To avoid the application of Texas law, counsel for the children contended that the contract and will worked an equitable conversion of the mineral estates into personal property, the transfer of which should be governed by the law of the testator's domicile, Ohio. Relying on various text writers, the court rejected this contention and said: "If this view [that Texas law governs] should impress some as legalistic in the sense of excluding the intent of the testator that his mineral interest should become corporate stock, it is hardly more of a 'technical' approach than that of regarding 'as done' that which was *not* done, in order to deprive the petitioners of the last remnant of benefits the testator obviously intended them to have, and, in effect, to enforce here a legislative policy of Ohio, *which is contrary to the policy of our own Legislature*." 152 Tex. at 593, 261 S.W.2d at 702. (Emphasis added.)

10. Skepticism regarding the existence of such a policy may be engendered by the following observations:

(1) Substantial capital investment in Texas would normally take a corporate form consisting of stocks of corporations operative there. Such stocks would constitute movable property whose transmission on death would be governed by the law of the testator's domicile.

(2) Assuming a capitalist in one of the twelve states restricting gifts to charity desired to evade

law to cases involving nonresident testators. Or, taking a bolder stance, he might simply assert that a state must *always* have (or be conclusively presumed to have) a legitimate governmental interest in any case in which the title to its land is at stake. One is inclined to suspect, however, that the thoughtful student of conflict of laws would find these purported reconciliations reminiscent of Alice's difficulty in believing impossible things.

For the denial of certiorari in the *Hickok* case there is a simple historical explanation: the four fatal cases of *Clarke v. Clarke*,[11] *Fall v. Eastin*,[12] *Olmsted v. Olmsted*,[13] and *Hood v. McGehee*.[14] The first two of these cases involved full faith and credit to judgments only and all of them were decided between 1900 and 1915, twenty years before Chief Justice Stone articulated the governmental interest analysis, which in subsequent cases has provided the conceptual framework for the established doctrine of full faith and credit to foreign laws.[15] The teaching of these four cases is hopelessly inconsistent with that doctrine; sooner or later the Supreme Court will have to reconsider them in the light of subsequent developments.

With a view to such future reconsideration, and because of their current importance in state courts (the *Hickok* opinion relied heavily upon *Clarke v. Clarke*), it is the purpose of this Article to analyze each of these cases in terms of governmental interests, to probe the reasoning on which they are founded, and to evaluate them as precedents for the future. Before the cases themselves are considered, a brief sketch of the preceding historical development may contribute to a clearer understanding of them.

I. Historical Development of the Land Taboo

It was not until the end of the eighteenth century that English courts reluctantly began to adopt foreign law as a rule of decision in cases involving torts or breaches of contract.[16] At this time the House of Lords also held that the personal property of a nonresident intestate should be distributed according to the law of his domicile.[17] But for various historical reasons English lawyers of that era simply assumed that testate or intestate succession to English land must always be governed by English domestic law.[18] The extreme example of this re-

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the restrictions, several well-tried and effective devices are available for doing so without transferring funds to Texas enterprises. The policy suggested, therefore, would be hopelessly ineffective.

(3) The real interest of Texas is not to make futile attempts to help foreign testators evade their domiciliary laws but rather to cooperate with other states to the end that Texas testators may freely dispose of their land in other states.

11. 178 U.S. 186 (1900).

12. 215 U.S. 1 (1909).

13. 216 U.S. 386 (1910).

14. 237 U.S. 611 (1915).

15. Alaska Packers' Ass'n v. Industrial Acc. Comm'n, 294 U.S. 532 (1935).

16. Cheshire, Private International Law 36–37 (7th ed. 1965).

17. Balfour v. Scott, 6 Brown Parl. Cas. 550, 2 Eng. Rep. 1259 (H.L. Scot. 1793); Bruce v. Bruce, 2 Bos. & Pul. N.R. 299, 126 Eng. Rep. 1251 n.(a) (H.L. Scot. 1790).

18. This is explained principally by the fact that English common-law courts, enforcing English common law and various English statutes, had from time immemorial maintained exclusive jurisdiction over succession to legal estates in English lands. Succession to personal property, on the other hand, had long been subject to the control of the ecclesiastical courts and Chancery. Moreover, since foreign courts might be able to collect and distribute debts by subjecting the debtor or his assets to their process,

sistance to foreign law where English land was concerned is *Birtwhistle v. Vardill*, decided by the House of Lords in 1840 after prolonged consideration.[19] It was there held that a domiciled Scotsman, the son of a domiciled Scotsman, could not inherit English land from his father because he had been born out of wedlock, although the subsequent marriage of his parents had made him a legitimate heir of his father for all purposes under Scottish law.

Such rigid adherence to the law of the situs in all matters of succession to interests in land was likely to prove a most inconvenient doctrine in the United States where land was an important form of wealth and the same person might own land in several states. To be completely effective, the will of such a person would have to comply with the formal requirements of every state in which his land was located[20] and might then receive a different construction in each state. If he died intestate, he might have a different heir or heirs for each state. It is not surprising that American courts and legislatures rejected, in various particulars, the rigid and simplistic English doctrine. Beginning with an Ohio statute of 1805,[21] the legislatures of various states enacted laws that sustained the validity of wills complying with the law of the place of execution or in some states with the law of the testator's domicile.[22] One of the first model uniform laws recommended to the states for adoption by the Commissioners on Uniform State Laws was a statute of this type.[23]

The specific holding of *Birtwhistle v. Vardill* was followed in a few states,[24] but the majority of American courts avoided adherence to the law of the situs by classifying the issue as one of personal status rather than one of inheritance and referring it to the law of the child's domicile at birth or the law of the father's domicile at the time of the legitimizing acts.[25] In construction cases, where a testator's will was silent upon an important question affecting the disposition of his real property, some courts avoided a mechanical and purposeless reference to the law of the situs by using a bold legal fiction. They held that the testator intended (or should be presumed to have intended) the law of his domicile to de-

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it seemed desirable to cooperate with them in establishing a uniform rule. See Hancock, *Equitable Conversion and the Land Taboo in Conflict of Laws*, 17 STAN. L. REV. 1095, 1102–05 (1965).

19. The case was first argued before the judges and the House of Lords in 1830, at which time the judges gave an opinion per Chief Baron Alexander against the claim of the son born out of wedlock. Nothing further was done until 1835, when the matter was discussed by several members of the House and ordered to be reargued before the judges. 2 Clark & Fin. 571, 6 Eng. Rep. 1270 (H.L. 1835). A reargument took place in 1839, and, on hearing the opinion of the judges delivered by Chief Justice Tyndal in accord with the opinion of 1830, the House rendered its final judgment to the same effect in 1840. 7 Clark & Fin. 895, 7 Eng. Rep. 1308 (H.L. 1840).

20. "Perhaps nothing has shaken the respect of even intelligent laymen for the wisdom of the law more than the fact that a will will pass real estate in one State and be utterly null and void as to that in an adjoining State. Most attorneys in active practice have doubtless realized the difficulties arising from so many statutes on the subject in force in this country, when called upon to hastily draw a will for a person who owned real estate in different States . . . ." Lindsay v. Wilson, 103 Md. 252, 271, 63 Atl. 566, 569 (1906). A similar comment was made in Castens v. Murray, 122 Ga. 396, 50 S.E. 131 (1905).

21. Ohio Laws 1804–1805, ch. 27, § 2, at 174.

22. For a description and classification of these statutes see Hopkins, *The Extraterritorial Effect of Probate Decrees*, 53 YALE L.J. 221, 255–56 (1944).

23. See 4 RABEL, CONFLICT OF LAWS, A COMPARATIVE STUDY 295–96 (1958).

24. *E.g.*, Lingen v. Lingen, 45 Ala. 410 (1871); Smith v. Derr's Adm'rs, 34 Pa. 126 (1859).

25. The leading nineteenth-century case was Miller v. Miller, 91 N.Y. 315 (1883). The older cases are collected in Annot., 73 A.L.R. 941 (1931).

termine the construction of his will.[26] In a variety of cases where the enforcement of the law of the situs would have produced unpalatable results courts avoided such results by finding that an interest in land had been equitably converted into personal property.[27] This fallacious but convenient escape device permitted the courts to adopt a different choice-of-law formula, one appropriate to the transfer of personal property.

While pursuing these tactics of evasion in certain types of cases, American courts continued to pay a most exaggerated deference to the broad formula that purported to subject all questions concerning land titles to the law of the situs. This attitude was doubtless due in part to Mr. Justice Story's uncritical adherence to the extreme English view in his influential treatise.[28] It is also very probable that some American judges suffered from an inarticulate "anxious fear" that a liberal acceptance of foreign law might undermine the policy of local recording systems and create clouds on titles.[29] A forthright functional analysis clearly distinguishing between those rules of the forum-situs that, because of their policy and effect, ought to be enforced in all cases and those that might give way in favor of the law

26. See Guerard v. Guerard, 73 Ga. 506 (1884); Keith v. Eaton, 58 Kan. 732, 51 Pac. 271 (1897); Bolling v. Bolling, 88 Va. 524, 14 S.E. 67 (1891). For other cases and dicta see Annot., 79 A.L.R. 91 (1932).

27. West Va. Pulp & Paper Co. v. Miller, 176 Fed. 284 (4th Cir. 1909); Estate of Skerrett, 2 Coffey Prob. Dec. 235 (Cal. Prob. Ct. 1888); Ford v. Ford, 80 Mich. 42, 44 N.W. 1057 (1890); Hope v. Brewer, 136 N.Y. 126, 32 N.E. 558 (1892); Chamberlain v. Chamberlain, 43 N.Y. 424 (1871); see Jenkins v. Guarantee Trust & Safe Deposit Co., 53 N.J. Eq. 194, 32 Atl. 208 (Ct. Err. & App. 1895) (similar escape device). For discussion of these and other cases see Hancock, *Equitable Conversion and the Land Taboo in Conflict of Laws*, 17 STAN. L. REV. 1095, 1111–27 (1965); Hancock, *"In the Parish of St. Mary le Bow, in the Ward of Cheap,"* 16 STAN. L. REV. 561, 578–85, 612–13 (1964).

28. See STORY, COMMENTARIES ON THE CONFLICT OF LAWS 361, 363, 369–70, 383, 398–99, 404–05 (1st ed. 1834). Though his book was intended to introduce common-law judges and practitioners to foreign doctrines, Story deeply mistrusted the foreign doctrine that the validity of deeds and wills might be sustained if they complied with the forms of the place of execution. "They [foreign jurists] seem wholly to have overlooked, on the other side, the inconvenience of a nation suffering property, locally and permanently situate within its territory, to be subject to be transferred by any other laws, than its own; and thus introducing into the bosom of its own jurisprudence all the innumerable diversities of foreign laws, *to regulate its own title to such property*, many of which laws can be but imperfectly ascertained, and many of which may become *matters of subtile controversy*." *Id.* at 373. (Emphasis added.) "The common law has wisely adhered to the doctrine, that the title to real property can pass only in the manner, and the forms, and to the extent, allowed by the local law. It has thus *cut off innumerable disputes*, and given simplicity, as well as uniformity, to its operations." *Id.* at 377. (Emphasis added.)

29. This "anxious fear" has been detected by Barbour and Currie in the cases involving full faith and credit to foreign judgments affecting land titles. See Barbour, *The Extraterritorial Effect of the Equitable Decree*, 17 MICH. L. REV. 527 (1919); Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 627–28, 632–34, 638–39 (1954). It appears also in choice-of-law cases. See, *e.g.*, Nelson v. Potter, 50 N.J.L. 324, 326, 15 Atl. 375, 376–77 (1888). And see text accompanying note 61 *infra*. For expression of the same idea by commentators see MINOR, CONFLICT OF LAWS 28–29 (1901); Hening, *Is the Construction of Wills Devising Real Estate Governed by the Rules of Construction of the Domicil of the Testator or by the Rules of the Situs of the Property?*, 41 AM. L. REG. (n.s.) 718, 733 (1902).

The application of foreign law normally occurs in the course of a judicial proceeding at the situs. When the foreign law has been applied and the judgment rendered accordingly, that judgment will be an indisputable muniment of title, showing the title on the public records vested in the successful party. It is difficult to see how, in such a case, the use of foreign law could render the title uncertain. Where, however, a purchaser or mortgagee taking title to land has relied upon a rule of situs domestic law as determinative of the construction or effect of a will or other instrument in the chain of title, that rule of situs law should always be applied so far as necessary to protect the purchaser or mortgagee or his successors in interest. In such a context the rule serves the purpose of protecting purchasers and facilitating the transfer of titles. But there is no reason why such a rule should be applied in the usual case of litigation between mere gratuitous transferees claiming under a testator or donor. See Scoles, *Conflict of Laws and Elections in Administration of Decedents' Estates*, 30 IND. L.J. 293, 297 (1955).

of decedent's domicile would have been very helpful, but such an analysis was not forthcoming from either judges or commentators. At the turn of the century American judges, while paying lip service to the situs formula, contrived to avoid it in practice through a variety of escape devices when that course seemed to accord with their intuitive sense of the policies of local and foreign rules of law.

II. Supreme Court Recognition of the Land Taboo

A. *Clarke v. Clarke*

Against this somewhat confusing background the case of *Clarke v. Clarke*[30] came before the Supreme Court in 1900. Mrs. Henry P. Clarke, a wealthy heiress and granddaughter of P. T. Barnum, died domiciled in South Carolina survived by her husband and two infant daughters, Nancy and Julia, all domiciled in that state. At her death she owned considerable personal estate and valuable real property located in South Carolina, Connecticut, New York, and Kansas. By her will, after several pecuniary legacies, she gave the entire residuary estate, real and personal, to her husband and daughters in equal shares. The husband was directed to hold the daughters' shares in trust until they reached the age of twenty-five "and then to pay the whole sum over" to each of them respectively. Four months after Mrs. Clarke's death Julia, the younger daughter, died aged eighteen months and, of course, intestate, thus creating one of those situations that make the situs formula seem so absurd. Under the law of South Carolina Julia's equitable interest in the real property devised by her mother would have gone to Nancy and her father in equal shares. Under the law of New York it would have gone to her father for life with remainder to Nancy. Connecticut would have given Julia's entire share to Nancy, while Kansas would have given it all to the father.[31]

From the point of view of governmental interest analysis, South Carolina had a most substantial interest, while the other states had none. When a state legislature enacts a statutory scheme of intestate distribution it in effect makes wills for those of its citizens who choose not to make their own. In deciding what share a widow should receive or whether kindred of the half blood and adopted or illegitimate children should participate, a legislature will naturally be guided by the customs and popular sentiments of the local community. It will try to achieve a result which would be most likely to satisfy the average member of that community.[32] When a state undertakes to distribute the property of a helpless infant (a ward of the state) between her father and sister who are also citizens of that state, it surely has a governmental concern of a very high order. On the other hand, it is impossible to see what interest the people of Connecticut could have had in giving all the Connecticut real property to Nancy or what interest the people of Kansas could have had in excluding Nancy and giving all the Kansas real property to her father. By modern standards, such dispositions of the Kansas and Connecticut real property would have constituted officious intermeddling

30. 178 U.S. 186 (1900).
31. See Clarke v. Clarke, 46 S.C. 230, 238, 24 S.E. 202, 204–05 (1896).
32. See Atkinson, Wills §§ 6, 19 (1st ed. 1937); Rheinstein, Cases on Decedents' Estates 21 (1st ed. 1947).

with the personal affairs of the Clarke family, as regulated by the laws of South Carolina.[33]

Though lawyers of the late nineteenth century did not analyze their problems in terms of governmental interests, they occasionally made use of a closely analogous technique of statutory construction.[34] Moreover, when it was necessary to get around the situs formula, they had at their command some crude but effective tools. One of these, as we have noted, was the doctrine of equitable conversion. The Supreme Courts of South Carolina[35] and Connecticut[36] both agreed that if Mrs. Clarke's will had contained a direction that all her real property be sold, Julia's share would have devolved as personalty according to the law of South Carolina,[37] but her will did not contain such a direction. There was, however, a convenient doctrine, supported by Pennsylvania cases, that if a testator blended real and personal property, as Mrs. Clarke's will did, so as to show he intended to create a common fund and to bequeath the fund as money, an intention that the realty be converted into personalty might be *implied* from the terms of the will.[38] In the *Clarke* case the propriety of this construction was further fortified by the use of the words, "pay the whole sum," in relation to the final transfer to the daughters of their shares.

As executor and trustee under his wife's will, Henry P. Clarke began an action in the South Carolina courts praying a construction thereof. Nancy, who was then six years old, was made defendant and appeared by her guardian *ad litem* appointed by the court. The Supreme Court of South Carolina held, affirming the trial judge, that the language of Mrs. Clarke's will indicated an intention that all her real property be converted into money and that her will therefore worked an equitable conversion of her realty into personalty as of the time of her death. Both the supreme court and the trial judge pointed out that an equal division of Julia's share between her father and Nancy as personalty governed by South Carolina law would carry out the testatrix's manifest intention that father and daughters share equally under all circumstances.[39]

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33. The reasons why American courts in the position of the Kansas and Connecticut courts have usually enforced the law of the forum-situs are: (1) the relative rarity of the cases, which has caused judges and practitioners to rely heavily upon the commentators; (2) the uncritical acceptance of the traditional English attitude by American commentators, beginning with Story, see note 28 *supra*; and (3) the vague, incoherent fear that the introduction of a novel doctrine into the law of real property might disturb vested rights or unsettle the security of titles, see note 29 *supra*.

34. See Hancock, *"In the Parish of St. Mary le Bow, in the Ward of Cheap,"* 16 STAN. L. REV. 561, 574–96 (1964).

35. Clarke v. Clarke, 46 S.C. 230, 24 S.E. 202 (1896).

36. Clarke's Appeal, 70 Conn. 195, 39 Atl. 155 (1898).

37. This conclusion was supported by the equitable conversion doctrine of the cases cited in note 27 *supra* and, more specifically, by the dictum of the Supreme Court of Pennsylvania that if a certain devise had worked an equitable conversion, the beneficiary's interest in the land devised would have devolved in case of his intestacy according to the law of his domicile. Page's Estate, 75 Pa. 87, 95 (1874) (dictum). For modern examples see Duckwall v. Lease, 106 Ind. App. 664, 674, 20 N.E.2d 204, 209 (1939); Poore v. Poore, 226 Ky. 668, 675, 11 S.W.2d 721, 724 (1928).

38. "[I]n order to work a conversion, there must be either . . . 3d. Such a blending of real and personal estate by the testator in his will as to clearly show that he intended to create a fund out of both real and personal estate, and to bequeath the said fund as money." Hunt's Appeals, 105 Pa. 128, 141 (1884) (dictum); *accord*, Marshall's Estate, 147 Pa. 77, 23 Atl. 391 (1892) (per curiam).

39. Clarke v. Clarke, 46 S.C. 230, 233, 242, 24 S.E. 202, 203, 206 (1896). The Supreme Court of South Carolina also indulged in a little fiction. "The testatrix must be presumed to have known that, under the laws of this State, . . . in the event of the death of either husband or child, or children, the estate of the one so dying intestate would be shared equally by the two survivors, *whether the estate was realty or personalty*." *Id.* at 242, 24 S.E. at 206. (Emphasis added.) In the light of our analysis of

Having been appointed administrator of his daughter Julia's estate by a Connecticut probate court, Henry P. Clarke made application to that court for directions regarding the distribution of her beneficial interest in Connecticut land held in trust for her under her mother's will. Nancy was represented in this proceeding by a new guardian *ad litem* appointed by the Connecticut court, and Henry P. Clarke was made a party in his own right to claim a share of Julia's estate. From an unfavorable decree of the probate court, giving Julia's entire share to Nancy, he appealed to the Supreme Court of Connecticut. That court agreed with the South Carolina courts that if Mrs. Clarke's will worked an equitable conversion of her real property into personal property, Julia's interest in Connecticut land should be distributed according to South Carolina law. The court declined, however, to accept the South Carolina judgment as a conclusive adjudication of the construction of the will, binding upon Nancy and her father.[40] The Connecticut court also declined to adopt the South Carolina law as the proper law to govern the construction of the will. Instead of the easygoing South Carolina doctrine of equitable conversion (imported from Pennsylvania) the court followed a stricter rule, which only recognized an equitable conversion by implied direction to sell in cases where the terms of the will could not be carried out without a sale of the real property.[41] Thus the court concluded that Julia's beneficial interest in Connecticut land was not personal property but real property, which devolved at her death according to Connecticut law upon her sister Nancy alone.[42]

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the policies of the intestacy statutes and the governmental interests of the states, one is inclined to suspect that the South Carolina judges felt they were justified in stretching the doctrine of equitable conversion a little to persuade the courts of the situs states to apply South Carolina law.

40. The Connecticut court held that because Henry P. Clarke was not a party to the South Carolina proceedings in his own right he would not have been bound in his own right by an unfavorable decree in those proceedings. Clarke's Appeal, 70 Conn. 195, 208, 39 Atl. 158, 159 (1898). This position was fully supported by the United States Supreme Court's decision in Carpenter v. Strange, 141 U.S. 87 (1891). On the principle that the estoppels of a judgment must be mutual, it followed that Nancy was not bound by the South Carolina decree either. Moreover, the estate of Julia, the deceased beneficiary, had not been represented in the South Carolina proceedings. Clarke's Appeal, *supra* at 212, 39 Atl. at 160. These were the Connecticut court's chief reasons for not according full faith and credit to the South Carolina decree. "It is unnecessary to inquire whether, if he [Henry P. Clarke] had been a party individually to the South Carolina suit, and the principal administrator of the estate of Julia Clarke had also been brought in, the court would have had jurisdiction to make a final and conclusive determination as to the effect of the will upon lands in other States and their descent upon the decease of those in whose favor the testatrix disposed of them." *Id.* at 212–13, 39 Atl. at 160. Other passages in the opinion, however, suggest that the South Carolina decree was construed not to have adjudicated the construction of the will so far as it affected Connecticut land. *Id.* at 211–12, 39 Atl. at 160.

41. "The claim is made, and is not wholly without countenance in reported cases, that an intent to convert may be implied, in the absence of any positive direction to sell *or of any absolute necessity to sell*, if the will so blends together real and personal estate as clearly to show that the testator meant to create a common fund out of both, and to bequeath it as money. [Citation to the Pennsylvania equitable conversion doctrine.] . . . No general residuary devise and bequest can be given such an effect, as respects lands in Connecticut, unless from the *whole scheme of the will* or the particular language employed a power to sell is clearly implied." *Id.* at 217, 39 Atl. at 162. (Emphasis added.)

42. Since other courts of that era used the doctrine of equitable conversion to carve out an exception to the situs formula when another law seemed more appropriate and since the Connecticut court was willing to do the same thing, one is inclined to wonder why it was unwilling to stretch that doctrine a little in order to refer the whole question to the law and policy of the parties' domicile, which alone had a substantial interest in the matter. There is, however, a strong tradition that a law which protects the rights of an infant should be strictly enforced in favor of the infant, and the *Clarke* case involved the rights of Nancy B. Clarke, who was only six years old. The passage from the opinion quoted in note 41 *supra* suggests that the court thought the South Carolina court had indeed stretched the doctrine of equitable conversion. The Connecticut court might have avoided responsibility for the stretching by adopting the fiction that a testator normally intends the law of the domicile to govern the construction of his will. But since the court had already held that the South Carolina court's con-

In the Supreme Court of the United States it was not contended that the Connecticut court had denied full faith and credit to the law of South Carolina respecting equitable conversion or the construction of wills.[43] The sole ground of attack upon the Connecticut judgment was that it denied full faith and credit to the judgment of the South Carolina court as a conclusive adjudication of the construction of the will. In rejecting this contention, the Supreme Court relied upon two grounds of decision, one of which was relatively narrow. Nancy, who was then only six years old, had been represented by a guardian *ad litem* appointed by the South Carolina court for the proceedings in that state. "It cannot be doubted," wrote Mr. Justice White, "that the courts of a State where real estate is situated have the *exclusive right to appoint a guardian* of a non-resident minor, and vest in such guardian the *exclusive* control and management of land belonging to said minor, situated within the State."[44] From this it followed that the guardian *ad litem* appointed by the South Carolina court had no power to act for Nancy so far as the issues in litigation might affect her claim to Connecticut land. So far as its decree might affect that claim the South Carolina court had no jurisdiction over Nancy.

If Mr. Justice White had been content to rest the judgment of the Court on this ground alone, the case would deserve no more than a footnote in the present discussion. But he also rested the judgment upon a much broader ground, which has exercised a most unfortunate influence in subsequent cases:

> It is a *doctrine firmly established* that the law of a State in which land is situated controls and governs its transmission by will or its passage in case of intestacy. . . . The proposition relied on, therefore, is this, although the court of last resort of Connecticut (declaring the law of that State) has held that the real estate in question had not become personal property by virtue of the will of Mrs. Clarke, nevertheless it should have decided to the contrary, because a court of South Carolina had so decreed. This, however, is but to argue that the law declared by the South Carolina court should control the passage by will of land in Connecticut and therefore is equivalent to *denying the correctness of the elementary proposition* that the law of Connecticut where the real estate is situated governed in such a case. . . . The proposition, when truly comprehended, amounts but to the contention that the laws of the respective States controlling the transmission of real property by will, or in case of intestacy, are operative *only so long as there does not exist in a foreign jurisdiction a judgment* or decree which in legal effect has changed the law of the situs of the real estate.[45]

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struction was not binding upon Nancy and that she was entitled to have the issue reconsidered, it would surely have seemed anomalous to bring that construction back into the case through the choice-of-law door in order to enforce it against her. To reach sensible results in choice-of-law cases courts frequently find themselves compelled to drastically manipulate the crude and promiscuous choice-of-law formula and escape device. To the uninitiated such manipulation sometimes seems slightly improper. Because the rights of an infant were involved, the Connecticut court was unwilling to undertake it.

43. In 1900 it had not yet become fashionable to argue that the full faith and credit clause compelled a state to apply the statutory or decisional law of another state. See Currie, *The Constitution and the Choice of Law: Governmental Interests and the Judicial Function*, 26 U. CHI. L. REV. 9, 35–39 (1958).

44. Clarke v. Clarke, 178 U.S. 186, 193 (1900). (Emphasis added.) The court quoted a passage from its earlier decision in Hoyt v. Sprague, 103 U.S. 613 (1881), as authority upon this question.

45. 178 U.S. at 190–91. (Emphasis added.)

In the light of our brief historical survey, how should we characterize this "firmly established doctrine," so "elementary" that its correctness ought not to be denied? In the first place, it was an historical anachronism, derived in part from the centuries-old distribution of power among English courts.[46] At the time of the *Clarke* case it was a mere textbook aphorism that did not accurately represent the practice of American courts[47] or legislatures. Sixteen state legislatures (including that of Connecticut[48]) had abandoned it as a criterion for the validity of wills.[49] Through the nineteenth century, judges had evolved various exceptions and escape devices to evade the exclusionary situs formula, notably the fiction of equitable conversion, which was supposed to justify a different treatment of certain interests in land because they could be classified as personal property.[50] In the *Clarke* case itself the Supreme Court of Connecticut had conceded that if Mrs. Clarke's will had contained an express direction to sell her real property the devolution of Julia's interest in Connecticut land would have been controlled by the law of South Carolina. How can one be expected to believe that the situs formula expresses a policy so fundamental that it overrides the constitutional mandate of full faith and credit to sister-state judgments when the very court which has disregarded that mandate assures us that the situs formula could have been avoided by a few additional words in the testatrix's will?

Possibly Mr. Justice White did not really mean that Connecticut must *always* apply its own law concerning succession to land but rather that because of the nature of territorial sovereignty Connecticut must always remain *free* to apply its own law if it chooses to do so.[51] Put in this form the argument of the opinion still seems dreadfully undiscriminating; granting that there might be cases in which some local land policy affecting Connecticut residents could be frustrated by the enforcement of a sister-state judgment, why must *all* sister-state judgments affecting land be deprived of constitutional protection? More particularly, why should the South Carolina judgment in the *Clarke* case have been deprived of that protection when, as we have seen, South Carolina had a substantial concern in the distribution of family property passing from a South Carolina infant

46. See note 18 *supra*.

47. The five cases cited by the Court as authorities for this "firmly established" doctrine were *not* cases analogous to *Clarke v. Clarke*, in which a state court of the forum-situs had chosen to reject the law of a testator's domicile in construing his will. Four of them were cases litigated in federal courts which necessarily gave the same decision that a state court of the situs state would have given in accord with the rule laid down in Jackson *ex. dem.* St. John v. Chew, 25 U.S. (12 Wheat.) 153 (1827). The Court was indulging in the all-too-familiar but fallacious practice of transplanting a statement of law from a legal context in which certain policies prevail to another context where the policies involved are entirely different. See Hancock, *Fallacy of the Transplanted Category*, 37 CAN. B. REV. 535 (1959). The fifth case, litigated in the courts of the District of Columbia, involved the construction of the will of a testator *domiciled* in the District devising land located there.

48. Conn. Pub. Acts 1856, ch. 44, at 67.

49. See Hancock, *Equitable Conversion and the Land Taboo in Conflict of Laws*, 17 STAN. L. REV. 1095, 1106 n.55 (1965).

50. See authorities cited in and text accompanying note 27 *supra*.

51. Thus, following the passage quoted in the text accompanying note 45 *supra*, he wrote: "This is but to contend . . . that the fundamental principle which gives to a sovereignty an exclusive jurisdiction over the land within its borders is in legal effect dependent upon the non-existence of a decree of a court of another sovereignty determining the status of such land. Manifestly, however, an authority cannot be said to be exclusive, or even to exist at all, where its exercise may be thus frustrated at any time." Clarke v. Clarke, 178 U.S. 186, 191–92 (1900).

decedent to other members of her South Carolina family while Connecticut had no identifiable concern whatsoever? Mr. Justice White's argument overlooked the truly elementary principle that certain local laws, though affecting title to land, have policies that require their application only to cases involving members of the local political community and not to cases involving the relations of nonresidents. On the contrary, his argument assumed without question that if a state did not enforce its local laws in all cases concerning land titles (or at least remain free to do so) its sovereignty would, in some unspecified way, be drastically violated.[52]

B. *Fall v. Eastin*

Fall v. Eastin,[53] decided by the Supreme Court in 1909, had certain features in common with *Clarke v. Clarke*. While the *Clarke* case involved a judgment rendered at the domicile of an intestate that attempted to control the disposition of her foreign real property, the *Fall* case involved a judgment rendered at the domicile of a divorced husband and wife that attempted to control the disposition of foreign real property as part of a general redistribution of all their assets. As in the *Clarke* case the law of the domicile (Washington) differed from that of the situs (Nebraska) on the question at issue. Washington law empowered the divorce court to make "such disposition of the property of the parties . . . as shall appear just and equitable, having regard to the respective merits of the parties, to the condition in which they will be left by such divorce or annulment, to the party through whom the property was acquired . . . ."[54] Acting under this statute, the Washington court, having granted a divorce to Sarah Fall, ordered her husband, Edmund Fall, to convey to her his half interest in 160 acres of Nebraska land of which they were co-owners. After Sarah Fall had obtained possession of the land, Edmund Fall, having refused to convey his share to her, conveyed it instead to his sister Elizabeth Eastin and removed to California. Sarah Fall then sued Elizabeth Eastin in Nebraska to quiet title against her, alleging that Elizabeth's deed from Edmund had been made without consideration and

52. *Clarke v. Clarke* not only antedates the practice of analyzing cases in terms of governmental interests, it also belongs to an era when the Supreme Court was much less reluctant to recognize exceptions to the constitutional and statutory obligation of full faith and credit to sister-state judgments than it has been in recent decades. Only three years after the decision of the *Clarke* case the Court recognized such an exception in Anglo-American Provision Co. v. Davis Provision Co., 191 U.S. 373 (1903), which held that a New York court was not obliged to enforce the judgment of an Illinois court where the action to enforce the judgment was brought by one Illinois corporation against another and where the original cause of action was held by the New York courts to have arisen outside New York. The decision has been subjected to incisive criticism, see Currie, *The Constitution and the "Transitory" Cause of Action*, 73 HARV. L. REV. 268, 272–75 (1959), and has been virtually overruled by Kenney v. Supreme Lodge of the World, Loyal Order of Moose, 252 U.S. 411 (1920).

Less than eight years after the *Clarke* case four Justices of the Court contended in dissent that Mississippi should not be constitutionally obliged to enforce a Missouri judgment because that judgment enforced, as between Mississippi residents, a contract which was illegal and void under Mississippi law. Fauntleroy v. Lum, 210 U.S. 230, 238 (1908) (dissenting opinion). This dissent, written by Mr. Justice White, the author of the *Clarke* opinion, was concurred in by two other members of the *Clarke* court. In short, as a decision upon full faith and credit to judgments, *Clarke v. Clarke* is a pretty old case, coming from a time when the prevailing climate of judicial opinion on the subject of full faith and credit was very different from that of today.

53. 215 U.S. 1 (1909).

54. WASH. REV. CODE ANN. § 26.08.110 (1961).

to defraud Sarah Fall. The Nebraska trial court found these allegations to be true and entered the decree prayed for.[55]

This decree was reversed by the Supreme Court of Nebraska. Under Nebraska domestic law, divorce courts had no power to award the real property of one spouse to the other as "alimony." Noting this minor difference between the laws of the situs and the domicile, the court proceeded to apply the fallacious reasoning of Mr. Justice White in the *Clarke* case to the situation before it:

> The transfer and devolution of title to real estate within the limits of a state is entirely subject to the laws of that state and no interference with it can be permitted by other states. . . . Clarke v. Clarke . . . . Under the laws of this state the courts have no power or jurisdiction in a divorce proceeding, except as derived from the statute providing for such actions, and in such an action have no power or jurisdiction to divide or apportion the real estate of the parties. . . . A judgment or decree of the nature of the Washington decree, so far as affects the real estate, if rendered by the courts of this state, would be void. . . . We know of no rule which compels us *to give to a decree of the courts of Washington a force and effect we would deny to a decree of our own courts* upon the same cause of action. . . . [W]e are not compelled to recognize a decree affecting the title of E. W. Fall and his grantees . . . where the act directed by the Washington court is in opposition to the public policy of this state in relation to the enforcement of the duty of marital support. . . . [I]t is our duty to sustain the rights of the state to sovereignty over the land within its borders . . . .[56]

What was the policy underlying the Nebraska rule forbidding divorce courts to order a husband to convey real property to his wife? It was clearly not designed to regulate the use of the land or to secure the marketability of titles. As the court itself conceded in the quoted passage, it was a policy "in relation to the duty of marital support." The policy was to be applied in the divorce courts of Nebraska where the litigants would necessarily be Nebraska domiciliaries. To give it the effect of reaching out to encompass a wife and husband domiciled in Washington, whose property was being divided by a court of that state according to its law, was an absurd result which understandably provoked a vigorous and incisive dissent by Chief Justice Sedgwick.[57]

The Nebraska decision was sustained by a majority of the Supreme Court in an opinion remarkable for its strong flavor of confusion, uncertainty, and reluctance.[58] Justices Harlan and Brewer dissented. Mr. Justice Holmes agreed with the dissenters so far as to hold that the Washington decree would have been en-

55. Fall v. Fall, 75 Neb. 120, 124, 113 N.W. 175, 177 (1907).

56. *Id.* at 132–35, 113 N.W. at 180–81. (Emphasis added.) *Clarke v. Clarke* was also cited *id.* at 130, 113 N.W. at 179.

57. In an earlier opinion filed in December 1905 the Supreme Court of Nebraska affirmed the trial court's decision in favor of Sarah Fall. Justice Sedgwick wrote the majority opinion, in which Chief Justice Holcomb concurred. Justice Barnes delivered a short dissent. Fall v. Fall, 75 Neb. 104, 106 N.W. 412 (1905) (2-to-1 decision). In 1906 Chief Justice Holcomb left the court, Sedgwick became chief justice, and Charles B. Letton became the new associate justice. Upon a rehearing the former opinion was withdrawn and a new opinion *reversing* the trial court was filed in July 1907. The opinion was written by Justice Letton and concurred in by Justice Barnes. Fall v. Fall, 75 Neb. 120, 113 N.W. 175 (1907) (2-to-1 decision).

58. Fall v. Eastin, 215 U.S. 1 (1909). For a detailed criticism of this extraordinary opinion see Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 648–65 (1954).

titled to full faith and credit as against Edmund Fall but voted with the majority on the curiously insubstantial ground that the Nebraska court was not obliged to treat Elizabeth Eastin as a privy to that decree even though she had actual notice of it.[59] The majority apparently thought that they were constrained to decide as they did by a line of Supreme Court cases running back to 1832, but Currie's careful analysis has shown that they were entirely mistaken.[60] It is probable, too, that their minds were preyed upon by the "anxious fear" that enforcement of foreign land decrees might frustrate local recording laws and becloud titles,[61] a notion which had been unscrupulously exploited by the Supreme Court of Nebraska.[62]

A thoroughly modern analysis of the problem of *Fall v. Eastin* emphasizing the policies of the domestic laws in force at the situs and the domicile has been provided by the Supreme Court of Texas in the recent case of *McElreath v. McElreath*.[63] The facts of this case were virtually the same as those of *Fall v. Eastin* except that the husband was a party to the proceedings at the situs (Texas) and had made no attempt to transfer his interest. While both spouses were domiciled in Oklahoma an Oklahoma court granted the wife a divorce and ordered the

59. Fall v. Eastin, 215 U.S. 1, 14 (1909) (concurring opinion). This was an insubstantial ground because the Nebraska trial court found that the deed to Elizabeth Eastin was made without consideration and in order to defraud Sarah Fall. Fall v. Fall, 75 Neb. 120, 123–24, 113 N.W. 175, 176–77 (1907). None of the Nebraska judges suggested that Elizabeth Eastin was a purchaser in good faith. None of them suggested that under Nebraska law she was not in privity with Edmund Fall. The ground of the majority opinion was that Sarah Fall was "in no position to question" the transfer from Edmund Fall to Elizabeth Eastin. *Id.* at 135, 113 N.W. at 181.

In any event, the Nebraska court was not free to apply Nebraska law to determine what persons were bound by a Washington judgment where the judgment was entitled to full faith and credit, as Mr. Justice Holmes assumed. The effect of such a judgment should have been determined in the first instance by the law of the rendering state, Washington. But since the question of what parties were bound was really a jurisdictional question, the Washington law would have had to satisfy the Supreme Court's tests of due process of law. See Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111 (1912).

Why did Mr. Justice Holmes assume such an indefensible position? One guess is that, knowing the majority opinion was vague and incoherent, he decided upon the judicial strategy of attempting to narrow the effect of the decision so it could be distinguished in subsequent cases where the claim of a third party was not involved. This is what has actually happened in some of the state courts. See, *e.g.*, McElreath v. McElreath, 162 Tex. 190, 345 S.W.2d 722 (1961).

60. See Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 650–56 (1954).

61. The practical aspects of this problem have been thoroughly thought through by Currie, *id.* at 638–41, 663–65, who argues that courts of the forum-situs cannot be expected to permit the foreign decree to be recorded in the forum state because a title examiner would have no way of knowing whether the foreign court had acquired jurisdiction over the parties or was competent to render the decree under its domestic law. The governmental interest of the situs in the marketability of its land requires that its policy should prevail to this extent. Moreover, if the contumacious defendant should execute a transfer to a good-faith purchaser, he ought to receive whatever protection the law of the situs accords him; the interest of the situs state in the security of titles acquired by good-faith purchasers should also prevail. In short, this problem, like the other problems considered in this Article, should be resolved by a reasonable accommodation of the governmental interests of the situs, *where they are affected*, and the federal interest in interstate recognition of judgments. It ought not to be solved by a sweeping dogma that denies all efficacy to a foreign decree affecting rights in local land.

62. "If the Washington decree bound the conscience of E. W. Fall, so that when he left the jurisdiction of that state any deed that he might make would be *absolutely void*, and had he sold the land to an innocent purchaser, who had inspected the records and found that he was the owner in fee of an undivided one-half interest to the premises, such purchaser, though relying on the laws of this state for his protection, would receive *no title*. This is the contention of the appellee, *carried to its ultimate conclusion* . . . ." Fall v. Fall, 75 Neb. 120, 133, 113 N.W. 175, 180 (1907). (Emphasis added.) This all sounds suspiciously like the tired old "thin edge of the wedge," "Where shall we draw the line?" sophistry. For a more charitable explanation see Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 638–41 (1954).

63. 162 Tex. 190, 345 S.W.2d 722 (1961).

husband to convey to his wife a one-third interest in certain land located in Texas. Had a Texas court granted the divorce it would have had no power to order such a conveyance. Article 4638 of the Texas Revised Statutes, regulating the division of property on divorce, provided: "Nothing herein shall be construed to compel either party to divest himself or herself of the title to real estate."[64] Reversing two lower courts, the Supreme Court of Texas held that "as a matter of comity we will enforce the equitable decrees of a sister state affecting Texas land so long as such enforcement does not contravene an established public policy in this State."[65] Applying this principle to the case before them, the court held that the enforcement of a sister-state decree distributing the Texas real property of nonresident spouses upon divorce did not contravene the public policy of Texas.

In a lengthy dissenting opinion Justice Griffin obligingly restated the losing arguments. *Clarke v. Clarke* and *Fall v. Eastin* were, of course, referred to; the "anxious fear" fantasy made its inevitable appearance.[66] The principal argument of the dissent was the familiar fallacy of *Clarke v. Clarke*:

> In our case Article 4638, R.C.S., 1925, expresses the public policy of this State and such statute absolutely prohibits our Texas courts "to compel either party to divest himself or herself of the title to real estate." . . . *Surely we are not going to hold that the Oklahoma courts can do what the Texas courts are prohibited from doing.* . . . I cannot bring myself to penalize and discriminate against Texas citizens by such so called legal legerdemain.[67]

The majority found this argument totally unconvincing. Speaking through Justice Norvell, they said:

> Article 4638 establishes a policy governing Texas courts in cases involving divorce and property rights based upon the marital laws of this State. It does not purport to establish a public policy relating to land tenure by nonresidents. . . . [W]hat difference does it make to the State of Texas whether the property here involved is awarded to the ex-husband or the ex-wife of a broken Oklahoma marriage? Is there in Texas a public policy which perfers [*sic*] land tenure by males rather than by females? Is there a reasonable probability of the return of feudal tenures to Anglo-American jurisprudence, so that one owning land would be burdened with knight service? . . . It would seem that Texas should have no concern with the statutes and methods adopted by Oklahoma in settling the matrimonial differences of its citizens and their property rights.[68]

The majority also emphasized the mutual interdependence of the states in securing the application of their laws to cases involving their citizens and the desirability of encouraging reciprocity. "We expect other states to recognize our system of marital property ownership, so should we respect their schemes of

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64. TEX. REV. CIV. STAT. art. 4638 (1960).
65. McElreath v. McElreath, 162 Tex. 190, 207–08, 345 S.W.2d 722, 733 (1961).
66. "In conclusion, I believe we will have more certainty to land titles and less confusion if Texas continues her present policy of determining the title to Texas lands in accordance with its law and decrees, rather than permitting decrees of the other states to affect titles to Texas lands." *Id.* at 223, 345 S.W.2d at 743 (dissenting opinion).
67. *Id.* at 216–17, 345 S.W.2d at 739. (Emphasis added.)
68. *Id.* at 194, 199, 345 S.W.2d at 724, 728.

property ownership and attendant plans for the adjustment of property rights upon the dissolution of a marriage."[69]

The *McElreath* case has been interjected into the chronological discussion of Supreme Court cases because it strikes a very heavy blow at the fallacious doctrine of *Clarke v. Clarke* and *Fall v. Eastin* that states cannot be expected to recognize a sister-state judgment affecting the title to local land if it enforces a rule of law different from that of the situs. For in the *McElreath* case the half-century-old immunity from constitutional obligation proffered in the two earlier cases was rejected by a state court on the ground that it preferred to cooperate with courts of other states by enforcing their laws where the rights of their citizens were involved, expecting that those courts would accord similar treatment to Texas citizens. This surely suggests that there is something woefully wrong with the assumptions regarding state policy made in the two earlier cases. Moreover, while the Texas court used the term "public policy" rather than "governmental interest," its technique of analysis was essentially that of the more recent Supreme Court opinions applying the full faith and credit clause; the court said, in effect, that Texas had no governmental interest in the distribution on divorce of Texas real property owned by nonresidents, whereas the state of their domicile did have a substantial interest in such distribution. In short, the *McElreath* case strongly suggests two propositions: First, that the immunity from constitutional obligation carved out by the *Fall* and *Clarke* cases is undesirable and inimical to the true interests of the states, which are more concerned with the rights of their citizens than with the distribution of their land on death or divorce; second, that the two earlier cases are not consistent with the constitutional principles embodied in the Supreme Court's later decisions.

C. *Olmsted v. Olmsted*

Though *Olmsted v. Olmsted*,[70] decided by the Supreme Court in 1910, purported to rely heavily upon *Clarke v. Clarke* and *Fall v. Eastin*, the actual decision was in accord with the principle of the Court's later decisions that a state is free to apply its domestic law in a choice-of-law situation only where it has a legitimate governmental interest in the result. The essential question of the case was the construction of the will of Silas Olmsted, who had died domiciled in New York in 1874, devising a one-half interest in New York land to his son Benjamin Olmsted for life with remainder to the "lawful issue" of Benjamin. At that time Benjamin was domiciled in New York, married and the father of four children. Soon afterward he abandoned his wife and fathered two sons, born out of wedlock, by a paramour. In 1882, while domiciled in Michigan, he obtained a Michigan divorce from his wife and married his paramour. Under a Michigan statute enacted in 1881, this marriage legitimized their two sons.[71]

69. *Id.* at 193–94, 345 S.W.2d at 724. The doctrine of comity or reciprocity was eloquently expressed by Story. See Katzenbach, *Conflicts on an Unruly Horse: Reciprocal Claims and Tolerances in Interstate and International Law*, 65 YALE L.J. 1087, 1102–04 (1956). Unfortunately, the doctrine plays no part in his discussion of choice-of-law problems relating to land. Thus, its application in the present context by the Texas court, while breaking new ground, at the same time stands in a great tradition.

70. 216 U.S. 386 (1910).

71. MICH. COMP. LAWS § 27.3178(153) (1962).

On the termination of Benjamin's life estate in 1905 a partition suit to which all his children were parties was begun in the New York courts, thus raising the question whether the two sons of Benjamin and his second wife were his "lawful issue" within the meaning of his father's will.

Apart from its choice-of-law aspects this problem was of a type fairly common in the law of wills; a situation unforeseen by a testator had arisen for which his will made no provision. In the absence of admissible evidence regarding a testator's intention the state must resolve such problems by a dispositive rule of law, as it does in the case of intestacy. The state of a testator's domicile has a legitimate concern with filling the gaps in his will according to the customs and traditions of the community. The rule formulated will normally be one which the lawmaking authority considers appropriate to fulfill the desires of the average member of the community in the testator's situation.[72] By the law of New York at the date of Silas Olmsted's death, children born out of wedlock were indelibly illegitimate; the subsequent marriage of their parents could not change their status. The Court of Appeals of New York held that the meaning of the words "lawful issue" should be determined by the law of New York as it stood when the testator died; hence Benjamin's two sons by his second wife could not be included.[73]

On behalf of these two sons it was contended in the United States Supreme Court that the New York court's decision denied full faith and credit to a statute of Michigan—the domicile of Benjamin, his second wife, and their sons at the time of the marriage. This statute, as we have seen, had the effect of legitimizing the two sons. Today, such an argument would be easily answered; New York, having a legitimate governmental interest in the application of its law to the construction of the will of a New York domiciliary, was not obliged to give effect to the law of Michigan. But in 1910 the notion of full faith and credit to statutes was itself something of a novelty, and the doctrine of governmental interests as a touchstone for this constitutional obligation had not yet been evolved. Counsel for the four children of the first wife shrewdly relied upon a doctrine then much in vogue and supported by two contemporaneous decisions of the Court. "To permit the Michigan statute to control in determining who are the lawful issue of Benjamin Olmsted . . . would be a recognition of the right of the legislature of Michigan to legislate with respect to the disposition of real estate located in New York, and would lead to much confusion, and tend to upset land titles."[74] Counsel's forensic wisdom was confirmed by the unanimous opinion of the Supreme Court which, after carefully summarizing *Clarke v.*

72. See RHEINSTEIN, CASES ON DECEDENTS' ESTATES 597–602 (1947).

73. "Recently many of our sister states have adopted statutes similar to those of France, providing that the subsequent marriage of the parents legitimized the child or children previously born. Such a statute was adopted in Michigan in 1881 and in this state in 1895. These statutes, however, were passed long after the death of Silas Olmsted and the admitting of his will to probate, under which his legitimate grandchildren became vested as remaindermen in the estate left by him . . . ." Olmsted v. Olmsted, 190 N.Y. 458, 465, 83 N.E. 569, 570 (1908). The case was further complicated by the failure of the Michigan divorce court to obtain *in personam* jurisdiction over Benjamin Olmsted's first wife, with the result that New York was not obliged to give full faith and credit to the divorce decree under the rule of Haddock v. Haddock, 201 U.S. 562 (1906).

74. Olmsted v. Olmsted, 216 U.S. 386, 389 (1910) (argument of counsel for defendants in error).

Clarke and *Fall v. Eastin*, held that since New York would not have been obliged to enforce a Michigan judgment affecting local real property, it need not accord full faith and credit to the Michigan statute.[75]

D. *Hood v. McGehee*

Hood v. McGehee,[76] decided by the United States Supreme Court in 1915, was also a case in which the strong governmental interest of one state was not even discussed. Upon the death of George T. McGehee, who was at all material times domiciled in Mississippi, his two adopted children instituted proceedings in an Alabama federal court to establish their claim to inherit his Alabama real property. By a holographic will, invalid in Alabama,[77] he had given them virtually his entire estate. Under Mississippi law the children, who had been adopted by notarial act in Louisiana, were entitled to inherit McGehee's property, but at that time the Supreme Court of Alabama had placed upon its local statutes the curious construction that though children adopted in Alabama could inherit real property from their adopting parents, children adopted in other states could not.[78] From a modern point of view Mississippi had a substantial interest in seeing that the property of its deceased citizen should be distributed to his adopted children as he intended it to be. On the other hand, it is impossible to conjure up any legitimate interest of Alabama in its senseless and provincial policy of discrimination against children adopted in other states.

A governmental interest analysis such as this had scarcely been thought of in 1915; counsel for the adopted children did not even suggest that the Mississippi statute of descents was entitled to full faith and credit. Instead they argued that the Louisiana notarial act that purported to confer the right of inheritance was entitled to full faith and credit. Assuming that a notarial act fell within the category of "public acts, records and judicial proceedings," it was certainly not the equivalent of a judicial decree in adversary proceedings. Moreover, since McGehee and his children were domiciled in Mississippi, Louisiana's interest, if any, in the transfer of his property to them on death was trivial compared to that of Mississippi. The Supreme Court rejected the adopted children's contention. In a short opinion Mr. Justice Holmes restated the principle of the earlier cases

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75. "The full faith and credit clause of the Constitution applies with no more effect to the legislative acts of a foreign State than it does to the judgments of the courts of such State." *Id.* at 394–95.

76. 237 U.S. 611 (1915).

77. The holographic will was valid under Mississippi law and had been probated there. *Id.* at 614. A strong policy argument can be made in favor of the recognition at the forum-situs of a will that is void under local law but valid under that of the testator's domicile, and many states have legislation to this effect. See Hancock, *Equitable Conversion and the Land Taboo in Conflict of Laws*, 17 STAN. L. REV. 1095–102, 1106 (1965).

78. See Hood v. McGehee, 189 Fed. 205, 206 (N.D. Ala. 1911); Brown v. Finley, 157 Ala. 424, 47 So. 577 (1908). The Alabama rule was contrary to the view generally prevailing in other states. The leading case propounding the majority view is Ross v. Ross, 129 Mass. 243 (1880). For other decisions to the same effect see Annot., 73 A.L.R. 964 (1931).

The pointless and unreasonable discrimination of the Alabama law suggests that it involved a violation of the privileges and immunities clause of the federal constitution. See Currie & Schreter, *Unconstitutional Discrimination in Conflict of Laws: Privileges and Immunities*, 69 YALE L.J. 1323, 1347–49, 1390–91 (1960).

with rhetorical flourish. "Alabama is sole mistress of the devolution of Alabama land by descent."[79]

E. *Summary*

Through these four cases, all decided more than half a century ago, runs one persistent theme, the doctrine that a state's sovereignty would be seriously invaded if it were not permitted to apply its own law to all questions affecting title to its land. The doctrine was and still is empirically unsound; American state courts have at times referred such questions to the laws of other states without any ill results. That the doctrine is inconsistent with the principles of full faith and credit to foreign law recently enunciated by the Supreme Court is demonstrated by the foregoing analysis of each of the four cases. In *Hood v. McGehee* Mississippi, as the domicile of the decedent and his two adopted children, had a substantial interest in securing to them the inheritance of his Alabama land, but the law of Alabama—which had no interest at all—was allowed to prevail. *Olmsted v. Olmsted* reached the right result, but for the wrong reason: New York had an interest because the testator had been a member of that political community—*not* because the land was located there. In the *Fall* and *Clarke* cases courts of the forum-situs cavalierly disregarded judgments of sister states applying their own laws in situations where the sister states had a substantial interest, while the forum-situs states had none. These two old cases are also out of harmony with the policy of res judicata which the Court has so strongly emphasized in recent decades.[80]

One final objection to the doctrine of these cases remains to be considered. In order to transform the doctrine into a principle of immunity from the constitutional obligation of full faith and credit to judgments, the judges turned it into a rule of jurisdiction. They held that issues of law or fact determined by a nonsitus court need not be treated as res judicata by the courts of the situs because a nonsitus court *has no jurisdiction to determine such issues.*[81] Thus the doctrine which purported to protect the sovereignty of the situs against the application of nonsitus law was extended, in theory at least, to cover cases where the nonsitus court had actually applied the law of the situs. In such cases questions of fact, which the parties had already litigated, would be open to relitigation at the situs.

In short, the apparent effect of these four old cases has been to add to the law of full faith and credit two drastic and ill-founded propositions: First, that in litigation at the situs of land concerning title thereto, issues of law or fact determined by a nonsitus court need not be given any res judicata effect; second,

79. Hood v. McGehee, 237 U.S. 611, 615 (1915).

80. For a recent summary of this line of cases see Durfee v. Duke, 375 U.S. 106, 111-16 (1963).

81. "[T]he decree of the South Carolina court, in the particular under consideration, was not entitled to be followed by the courts of Connecticut, by reason of a *want of jurisdiction* in the court of South Carolina *over the particular subject-matter* which was sought to be concluded in Connecticut by such decree." Clarke v. Clarke, 178 U.S. 186, 195 (1900). (Emphasis added.) "[W]e think that the doctrine that the court, *not having jurisdiction of the res*, cannot affect it by its decree, nor by a deed made by a master in accordance with the decree, is firmly established." Fall v. Eastin, 215 U.S. 1, 11 (1909). (Emphasis added.)

that in such litigation the courts of the situs need not give full faith and credit to the statutes or common law of another state.

III. A Modern Analysis

A modern analysis of full faith and credit in the real property field should distinguish at least five types of cases, three involving foreign judgments and two involving foreign statutes or judicial decisions. The first type of case would be one in which a court, applying the law of the situs, has undertaken to determine the rights of parties subject to the forum's jurisdiction relating to land in another state. In subsequent litigation at the situs the court has been asked to treat the former adjudication by the nonsitus court as conclusively settling all issues of law and fact between the parties. Such a case would be distinguishable on its facts from the *Clarke* and *Fall* cases because in those cases the nonsitus court did not apply situs law. But the sweeping pronouncements of those cases include a claim that in this hypothetical situation the nonsitus court would have had *no jurisdiction* to determine such issues although it had *in personam* jurisdiction over all interested parties.

These pronouncements are in hopeless conflict, however, with the long-established practice of courts of equity, sanctioned by the Supreme Court itself,[82] under which a defendant personally before the court is compelled to execute a conveyance of his interest in land situated in another state.[83] That this practice is in every respect a lawful and constitutional exercise of judicial power cannot be disputed. The conclusion seems inescapable that if the defendant has executed a conveyance in obedience to such a decree, the courts of the situs may not constitutionally hold that the execution was an ineffectual act because the foreign court had no jurisdiction to compel its performance.[84] The conclusion seems likewise inescapable that even if the defendant has eluded the power of the court of equity and has refused to execute the conveyance, the courts of the situs are constitutionally obligated to treat the former proceedings as res judicata with respect to all issues of fact determined therein and as imposing a binding obligation on the defendant to obey the decree. Can it be seriously contended that, although the court of equity had jurisdiction to compel the defendant to convey the property, it had no jurisdiction to decide the issues of fact on whose adjudication its decree necessarily rested or to impose any enforceable obligation on the defendant,[85] so that if he should elude the officers of the court, all goes for

82. The classic case is Massie v. Watts, 10 U.S. (6 Cranch) 148 (1810) (Marshall, C.J.).

83. This conflict has been the subject of a great deal of commentarial debate, some of it largely beside the point and quaintly impractical. The views of various writers are restated and considered in Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. Chi. L. Rev. 620 (1954).

In the *Clarke* and *Fall* cases the Supreme Court noted the established equity practice as constituting some kind of an exception to its sweeping pronouncements but made no attempt to define its limits or to reconcile it with those pronouncements. See Fall v. Eastin, 215 U.S. 1, 10 (1909); Clarke v. Clarke, 178 U.S. 186, 193 (1900).

84. This proposition has seldom, if ever, been questioned. See Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. Chi. L. Rev. 620, 630–31 (1954).

85. Chief Justice Sedgwick of Nebraska remarked in his dissent to *Fall v. Fall*: "The decree [of the nonsitus court] is binding upon the conscience of the parties. In what sense is it binding upon the conscience? Would the consciences be released from obligation of this decree as soon as they crossed the

naught?[86] Once more we find ourselves expected to believe impossible things.

The traditional chancery practice is clearly desirable because it provides a more convenient forum in cases where lengthy litigation at the situs would be expensive and burdensome for the parties. To permit one of the parties to disobey the decree after he has had his day in court is to disregard the basic policy of the full faith and credit clause. When an issue of fact has been litigated and decided in the courts of one state, it is both futile and unfair to allow the losing party to relitigate it in another.[87] While it does not deal directly with the present question, the Supreme Court's recent decision in *Durfee v. Duke* demonstrates very clearly that adjudicated issues of fact affecting title to land are *not* subject to any mystical immunity from the full faith and credit clause or from the policy of res judicata which the Court has continually emphasized during the last three decades.[88] There is no valid reason why the judgment of a court that has jurisdiction over the parties and that has applied the law of the situs and decided the indicated issues of fact should not be entitled to full faith and credit at the situs.[89]

The second type of case requiring separate consideration is that in which a nonsitus court with jurisdiction over the parties has applied its own domestic

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state line? If their consciences are affected and bound by the decree it would seem that they would be so bound until they complied with the decree. If litigants come before the courts of equity of this state and concede that they are in conscience bound to acknowledge the rights and interest of their adversary in the matter in dispute, what is the duty of the court of equity? It is for no other purpose that courts of equity are established. It is to compel litigants to do what they are in conscience bound to do." 75 Neb. 120, 148, 113 N.W. 175, 185–86 (1907).

86. Mr. Justice Norvell, speaking for the majority in *McElreath v. McElreath*, remarked: "A competent court of that state [Oklahoma] having acted, and presumably having made a proper and equitable adjustment of the property rights of the divorcing parties, it is anomalous, to say the least, to assert that the work of that court may be set at naught by the defendant's crossing the state line and coming to Texas. There is no doubt but that had he remained in Oklahoma, the decree could and would have been enforced by contempt proceedings. As a matter of justice, good order and common sense, the Oklahoma decree should be enforced in Texas, unless contrary to some well defined public policy of this State. There is something incongruous and out of keeping with the concept of orderly processes to tolerate a situation wherein solemn court decrees may be flouted by playing hop-skip with state boundaries," 162 Tex. 190, 193, 345 S.W.2d 722, 724 (1961).

87. "It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first." Stoll v. Gottlieb, 305 U.S. 165, 172 (1938).

88. "To be sure, the general rule of finality of jurisdictional determinations is not without exceptions. . . . But no such overriding considerations are present here. While this court has not before had occasion to consider the applicability of the rule . . . to a case involving real property, we can discern no reason why the rule should not be fully applicable." Durfee v. Duke, 375 U.S. 106, 114–15 (1963). (Citations omitted.)

89. This thesis, as applied to probate and other decrees affecting the distribution of real property on death, is supported by Hopkins, *The Extraterritorial Effect of Probate Decrees*, 53 YALE L.J. 221, 251–54 (1944).

A formalistic but extremely influential tradition requires that orders and decrees of a nonsitus court be drafted with great care so that the court does *not* appear to be directly declaring what right, title, or interest the parties have in the foreign land. The court must not appear to be disposing of the title to foreign land *as if* it were part of the soil of its own state. Only the situs court has that power. Thus in the *McElreath* case, although the Texas court was prepared as a matter of comity to enforce the Oklahoma court's order that Mr. McElreath convey to his wife a one-third share in his Texas land, the court thought it necessary to scrutinize the Oklahoma decree very carefully and to point out its intended operation was strictly *in personam*. 162 Tex. 190, 195–98, 245 S.W.2d 722, 725–27 (1961). For an excellent illustration of what to avoid in drafting such a decree see the corrections in the trial court's decree made by Justice (now Chief Justice) Traynor in Rozan v. Rozan, 49 Cal. 2d 322, 332–33, 317 P.2d 11, 16–17 (1957). The subject is thoroughly discussed in Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 639–41, 671–73 (1954).

law to reach a result that conflicts with the policy of the law of the situs. This is the type of case that has occasioned so much apprehensiveness on the part of judges and commentators. Since most courts have a healthy respect for the power of the situs court, actual examples of this type of case are hard to find, but a hypothetical one will serve. Suppose that *M*, a married woman, resides in state *D*, whose law prohibits a married woman from conveying her real property unless her husband joins in the conveyance. *M* owns valuable real property situated in state *S*, whose law permits a married woman to convey her real property as if she were a *feme sole*. *M* sells and conveys this real property to *P* without the consent or concurrence of her husband, *H*. *P* records his deed in state *S* and resells the real property to *B*. *B* and *P* are both domiciled in state *R*, whose law is the same as that of state *S*. *M* and *H* bring suit in the state *D* courts against *P* and *B*, praying that they be ordered to reconvey the real property to *M*. The state *D* court, having *in personam* jurisdiction over *P* and *B*, decides to apply its own law and grants the relief prayed for. *P* and *B* do not execute the conveyances.

M and *H* then bring suit against *P* and *B* in state *S*, praying that the decree of the state *D* court be carried into effect.[90] The state *S* court dismisses the action on the ground that the enforcement of the state *D* law through the medium of the state *D* judgment would contravene the policy of the state *S* law. One of the purposes of that law, according to the state *S* court, is to facilitate the free circulation of land by enabling married women to dispose of it without restraint and by enabling purchasers to take title from an adult female grantor without inquiry into her marital status.

If this case were carried to the Supreme Court,[91] it would have to decide whether the general policy of res judicata should prevail over the local land circulation policy of state *S*, which has a legitimate interest in the enforcement of that policy. It is not the purpose of this Article to take a position on this difficult and delicate question.[92] What is here insisted upon is that this type of case, in which the situs state has a genuine governmental interest, is essentially different from other types of cases in which it has none. The persistent error of the *Clarke* and *Fall* cases was to emphasize the interference with the policy of the situs state that

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90. For practical suggestions as to the proper form of action at the situs see Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 673–77 (1954).

91. When the Supreme Court *does* decide to hold, for the first time, that a particular foreign land decree should receive full faith and credit at the situs, the decision is not likely to be made in a case of this type. The initial decision will probably come in the easy case where no argument, save that of adherence to precedent, can be advanced against recognition of the decree, as where the situs state has *no reason* to desire the application of its law or where, after protracted and costly litigation, a nonsitus court has applied the law of the situs.

92. "The Court has said that the [full faith and credit] clause does not state an inexorable command, that the Court is the final arbiter, and that there may be exceptions from its operation. Thus, in the remote event that a court of a sister state were to repudiate the law of the situs in a matter importantly affecting a substantial land policy of the situs; and the Supreme Court were to refuse review on the ground that no federal question is involved; and the courts at the situs were to refuse effect to the foreign decree; only the Supreme Court could require that it be given effect, and it would still be open to the Court to hold that, in the particular case, the policy of the situs state should prevail." Currie, *Full Faith and Credit to Foreign Land Decrees*, 21 U. CHI. L. REV. 620, 643 (1954).

The law is, of course, otherwise as to money judgments. It is no defense to a suit upon such a judgment rendered by the court of a sister state that the state where enforcement is sought had the sole governmental interest in the outcome and that its law and policy were repudiated. Fauntleroy v. Lum, 210 U.S. 230 (1908).

this type of case would entail and then to dispose of all five types of cases as if they all posed the same problem. In the words of the old proverb, the Supreme Court threw out the baby with the bath water.

The third type of case is that in which a nonsitus court with jurisdiction over the parties has applied a rule of its domestic law which, though different from the law of the situs, does not conflict with any policy of the situs because the situs has no interest in the application of its policy. The *Clarke* and *Fall* cases are perfect examples of this type. In those cases the judges seem to have thought that because the judgment enforced a rule of law *different* from that of the situs a conflict of policies would result and the case would be similar to case two. But modern analysis has made the distinction very clear—where the parties are nonresidents and the policy of the situs does not concern the use, tenure, or marketing of its land, there is no real conflict. From a practical point of view this type of case is analogous to case one and should be similarly treated. *Clarke v. Clarke* may stand for the time being upon the narrower of its two alternative grounds; *Fall v. Eastin* should be overruled.

The fourth type of case does not involve a foreign judgment. In an original action brought at the situs the court has been asked to enforce a law of another state which would conflict with the governmental policy of the situs state, because the situs state has an interest in the enforcement of its policy. Our hypothetical example involving a married woman's conveyance would illustrate this type of case if we supposed that *H* and *M* took no proceedings in state *D*, but instead brought suit in state *S*, praying that the conveyances by *M* and *P* be set aside and the title quieted in *M*. Since the state *S* law was designed to facilitate the transfer of real property by removing all marital restrictions on the power of an adult female to convey title, state *S* would have a legitimate interest in the application of its law. Though none of the four old cases is precisely in point,[93] their broad pronouncements would support the power of the state *S* court constitutionally to apply its own law on the simplistic ground that the title to state *S* land is at stake. The more recent decisions of the Supreme Court outside the field of land titles would support the power of the state *S* court upon the more discriminating ground of the state *S* governmental interest.

The fifth type of case is that in which a court of the situs has been asked to enforce a law of another state, different from its own, but not in conflict with the policy of the situs state because that state has no interest in the application of its policy. The *Hickok* case, discussed at the beginning of this Article, admirably illustrates this type: Ohio had a substantial interest in the enforcement of its deathbed-gift law because the testator, his devisees, and his heirs were all Ohio residents, while Texas, the situs of the land devised, had no interest. The Supreme Court of Texas, however, refused to apply the Ohio statute, and the Supreme Court denied certiorari. Of the Court's four older decisions *Hood v. McGehee* is most directly in point; however, like the other three, it rested upon the mistaken

93. In *Olmsted v. Olmsted* the forum-situs (New York) had an interest in the application of its policy, but that policy was not one relating to the use or marketing of land. New York's policy related to the construction of wills, and its interest encompassed the particular case because the testator was a citizen of New York. In the hypothetical example of the text a land circulation policy of the forum-situs is at stake.

notion that the enforcement at the situs in real property litigation of foreign laws which *differed* from those of the situs would necessarily violate some governmental policy of the situs. Traces of this notion appeared in the Texas court's opinion in the *Hickok* case.[94] It is both ironical and instructive that only seven years later the Supreme Court of Texas in *McElreath v. McElreath* emphatically rejected, in the context of a divorce property distribution, the simplistic doctrine of the four old cases which had shielded its shortsighted decision in the *Hickok* case from the obligation of the full faith and credit clause.[95] *Hood v. McGehee*, like *Fall v. Eastin*, should be overruled.

It is a curious characteristic of conflict of laws in the United States that, though its problems are of constitutional and international importance, the volume of litigation is relatively small. As a result, judges and practitioners are inclined to rely heavily upon the text writers, most of whom are inclined to rely too uncritically upon the aphorisms of their predecessors. Yet the Supreme Court, though concerned only with constitutional limitations and located at the top of an expensive litigation ladder, has evolved a technique of analysis which modern judges and commentators are finding extremely useful. Through the writings of Professor Freund,[96] Professor Currie,[97] Chief Justice Traynor,[98] and others, the governmental interest analysis has been applied to the "petrified forest"[99] of traditional formulas with illuminating results. The highest courts of several states have also adopted the governmental interest analysis,[100] presumably because they found it helpful in understanding the real policy issues of choice-of-law cases. The opposition to this trend has been insignificant;[101] further developments in the same direction seem inevitable. In the light of governmental interest analysis the reasoning of the four old cases dissected in this Article appears indiscriminate and needlessly frustrating to the policies of nonsitus states. Paradoxically, it is the Supreme Court itself which has made it impossible to believe any longer[102] in the "land taboo" embodied in its earlier decisions.

94. See text accompanying note 9 *supra*.
95. See text accompanying notes 63–69 *supra*.
96. Freund, *Chief Justice Stone and Conflict of Laws*, 59 HARV. L. REV. 1210 (1946).
97. CURRIE, SELECTED ESSAYS ON CONFLICT OF LAWS (1963).
98. Traynor, *Is This Conflict Really Necessary?*, 37 TEXAS L. REV. 657 (1959).
99. Chief Justice Traynor's felicitous phrase. *Id.* at 670.
100. See Bernkrant v. Fowler, 55 Cal. 2d 588, 12 Cal. Rptr. 266, 360 P.2d 906 (1961); Thompson v. Thompson, 105 N.H. 86, 193 A.2d 439 (1963); Babcock v. Jackson, 12 N.Y.2d 473, 240 N.Y.S.2d 743, 191 N.E.2d 279 (1963); Lilienthal v. Kaufman, 239 Ore. 1, 395 P.2d 543 (1964); Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796 (1964); Wilcox v. Wilcox, 26 Wis. 2d 617, 133 N.W.2d 408 (1965).
101. See Hill, *Governmental Interest and the Conflict of Laws—A Reply to Professor Currie*, 27 U. CHI. L. REV. 463 (1960). For Currie's response see Currie, *The Verdict of Quiescent Years: Mr. Hill and the Conflict of Laws*, 28 U. CHI. L. REV. 258 (1961). A Delaware court has recently refused to follow the *Babcock* and *Wilcox* cases. See Friday v. Smoot, —— Del. ——, 211 A.2d 594 (1965).
102. The disbelief of modern courts is illustrated by Rozan v. Rozan, 49 Cal. 2d 322, 331, 317 P.2d 11, 16 (1957), in which the Supreme Court of California declared (by way of dictum) that its decree, issued in a divorce suit between two California residents, ordering the husband to convey to the wife certain land in North Dakota, would be entitled to full faith and credit in a North Dakota court. *Fall v. Eastin* was distinguished on the ground that because the Washington court ordered a commissioner to execute a conveyance of the Nebraska land, that court had "directly affected title to land in Nebraska." See note 89 *supra*.